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No.

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In The

# Supreme Court of the United States

AMERICOLD LOGISTICS, LLC,
AND AMERICOLD REALTY TRUST,

*Petitioners,*

v.

CONAGRA FOODS, INC.,
AND SWIFT-ECKRICH, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Petitioners Americold Logistics, LLC and Americold Realty Trust – a corporation and real estate investment trust, respectively – removed a case from Kansas state court to the United States District Court for the District of Kansas, asserting the parties were diverse. No party challenged the removal, and the District Court ruled on the merits of that litigation without addressing any issue relating to diversity jurisdiction. Likewise, neither party raised any jurisdictional challenge on appeal to the Tenth Circuit Court of Appeals.

The Tenth Circuit, however, *sua sponte* queried whether there was full diversity of citizenship among the parties. In particular, the judges challenged whether the citizenship of Americold Realty Trust, a business trust, should be determined by reference to its trustees' citizenship, or instead by reference to some broader set of factors. This issue has deeply split courts across the country. Joining the minority of courts, the Tenth Circuit held the jurisdictional inquiry extends, at a minimum, to the citizenship of a trust's beneficiaries in addition to its trustees' citizenship. In this case, doing so destroyed diversity of citizenship among the parties.

## QUESTION PRESENTED – Continued

The question presented by this petition is: Whether the Tenth Circuit wrongly deepened a pervasive circuit split among the federal circuits regarding whether the citizenship of a trust for purposes of diversity jurisdiction is based on the citizenship of the controlling trustees, the trust beneficiaries, or some combination of both.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Americold Logistics, LLC is a wholly owned subsidiary of Americold Realty Trust. Americold Realty Trust is a Maryland real estate investment trust; it is the legal successor to Americold Corporation. No parent corporation or publicly held company owns ten percent or more of Americold Realty Trust stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners submit this petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The Tenth Circuit decision below is reported at 776 F.3d 1175 (10th Cir. 2015). *See* Appendix ("App.") at 1-16. The Tenth Circuit's order staying the mandate pending this petition is unreported but reprinted at App. at 19-20.

The District of Kansas decision on the merits is unpublished but available at 2103 Westlaw 5530274 and App. at 23-40.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 27, 2015. The court denied a timely petition for rehearing *en banc* on February 23, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1332(a), which provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

It also involves 28 U.S.C. § 1332(c):

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State

where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

## STATEMENT OF THE CASE

This case concerns a threshold inquiry that arises every day in federal courts across the country. Constitutional limitations on federal jurisdiction make federal courts "courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). One of those limited categories is disputes involving more than $75,000 and involving "citizens of different States." 28 U.S.C. § 1332(a)(1). *See, e.g., Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998) ("A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same state."). The Tenth Circuit's ruling below, which adopted the minority position in an intractable circuit split, would unfairly close the federal courts to trusts, one of the most commonly used business entities responsible for billions of dollars in annual commerce.

This petition illuminates the irreconcilable split among the courts of appeals regarding the test for determining the jurisdiction of a trust for diversity purposes. The vast majority of circuits look to the citizenship of the trustees – the actors that actually control the actions of the trust. The Tenth Circuit departed from the norm, however, and has chosen to follow the minority of circuits that look to the citizenship of the trusts' beneficiaries. In doing so, the Tenth Circuit candidly noted the split in authority on the issue. On top of this, yet other courts apply even *different* tests in determining citizenship.

The split in authority has reached a point of no return. Unless decided by this Court, whether a trust may or may not make use of the federal court system will be determined by subjective factors dependent on anything from a Plaintiff's choice of defendant, a particular geographical location, or even a particular court or panel.

## 1. Background

On December 28, 1991, a fire destroyed an underground storage facility in Kansas City, Kansas. Americold Corporation owned and operated the facility in which Plaintiffs leased space for storage of food products. Several lawsuits were filed against Americold Corporation in April 1992 as a result of that accident and were consolidated (the "Kansas Action"). In March 1994, the parties reached a settlement that included an assignment to Plaintiffs of

the right to seek recovery of insurance proceeds and amounts in excess of policy limits from Americold Corporation's excess carriers, including Northwestern Pacific Indemnity Company ("NPIC"). The settlement also provided for the entry of a consent judgment against Americold in excess of $58 million. App. at 25-27.

### A. State Court Proceedings

In September 1994, after the entry of consent judgments against Americold Corporation in the Kansas Action, Plaintiffs commenced garnishment proceedings against Americold's insurers, including NPIC. App. at 28. That litigation lasted *eighteen years* from 1994 to 2012. Those eighteen years of disputes in the Kansas state court system included three trips to the Kansas Supreme Court. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (1997) ("*Americold I*"); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 975 P.2d 231 (1999) ("*Americold II*"); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 270 P.3d 1074 (2011) ("*Americold III*").

The garnishment action proceeded to a ten-week bench trial in the Fall of 2005. Near the end of the trial, NPIC sought to dismiss the garnishment proceedings on the newly discovered grounds that the District Court lacked subject-matter jurisdiction to conduct the garnishment proceedings because the consent judgments were dormant and extinct under Kansas law. In January 2006, the District Court

entered an order denying NPIC's motion to dismiss the garnishment action, and in August 2007 entered judgments against NPIC. App. at 28.

NPIC appealed. App. at 29. In December 2011, the Kansas Supreme Court reversed the District Court decision, holding that, because "Americold was not legally obligated to pay an unenforceable judgment, NPIC was no longer indebted to Americold." *Americold III*, 270 P.3d 1074, 1083. As a result of this ruling, Plaintiffs' underlying judgments were recognized to be extinguished, depriving the District Court of jurisdiction to proceed with the garnishment action. The Kansas Supreme Court remanded the case to the District Court with instructions to dismiss the garnishment proceedings. *Id.* Pursuant to that decision, the District Court dismissed the garnishment action and vacated the judgments against NPIC in June 2012. App. at 29.

### B. Proceedings Below

#### 1. District of Kansas

Plaintiffs returned to state court only three months after the Kansas Supreme Court's decision in *Americold III*. Plaintiffs filed a petition in state court in September 2012 against Americold Corporation's successor in interest – Americold Realty Trust – and Americold Logistics LLC asserting claims for breach of contract arising out of Americold's refusal to

execute Stipulations of Revivor that would allow Plaintiffs to execute on the 1994 Consent Judgments.[1] Plaintiffs claimed this refusal violated the settlement term that Americold would "execute any additional documents necessary to effectuate the purpose and intent of [the Settlement Agreement] or to pursue the assigned claims or execute on the judgments obtained by plaintiffs." App. at 31-32.

Americold Realty Trust is controlled by a Board of Trustees. App. at 56. Those trustees control virtually all aspects of the Trust. According to Americold's Articles of Amendment and Restatement, the trustees have "full, exclusive and absolute power, control and authority over any and all property" of Americold Realty Trust. App. at 60. However, Plaintiffs did not file this lawsuit against the controlling trustees. Instead, the petition names Americold Realty Trust and its wholly-owned Americold Logistics, LLC.

Without objection, Americold removed the case to the United States District Court for the District of Kansas on the basis of diversity jurisdiction. The parties filed cross-motions for summary judgment. None of the parties challenged the removal, and the District Court raised no quarrel with the parties' entitlement to federal jurisdiction. The District Court

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[1] Petitioner Americold Realty Trust, a Maryland real estate investment trust, is the legal successor to Americold Corporation. It also wholly owns the other Petitioner, Americold Logistics, LLC. For ease of reference, this Petition refers to all of these entities, collectively, as "Americold."

granted Americold's motion for summary judgment on the merits in October 2013, holding the consent judgments were "extinguished" as a matter of law and could not be revived under Kansas law. App. at 40. *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 2013 WL 5530274 at *7. Some of the Plaintiffs appealed this decision to the Court of Appeals for the Tenth Circuit.

### 2. Tenth Circuit

Following the submission of merits briefs, the Tenth Circuit *sua sponte* raised a potential jurisdictional defect in the notice of removal. The panel ordered supplemental briefing to address whether the notice of removal established diversity jurisdiction because it addressed the citizenship of the trustees without reference to the citizenship of the beneficial shareholders or beneficiaries of Americold Realty Trust. App. at 21-22.

Plaintiffs' decision to sue Americold Realty Trust – the *entity*, rather than its trustees – would prove fateful for purposes of diversity jurisdiction. Only two of the original Plaintiffs appealed the District Court's order: ConAgra Foods, Inc. f/k/a ConAgra, Inc. (a Delaware corporation with its principal place of business in Nebraska) and Swift-Eckrich, Inc. (a Delaware corporation with its principal place of business in Illinois). None of the Americold trustees were

domiciled in or residents of Delaware, Nebraska, or Illinois.[2] App. at 57

In its supplemental brief, Americold argued that, consistent with *Navarro Savings Association v. Lee*, "the citizenship of a real estate investment trust is determined solely by the citizenship of its trustees," and that the Court specifically rejected determining citizenship based on "the location of the '9,500 beneficial shareholders'." App. at 47 (citing *Navarro Savings Association v. Lee*, 446 U.S. 458, 464 (1980)). Americold also argued the Tenth Circuit previously held on at least three occasions, consistent with *Navarro*, that "where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity." App. at 48 (citing *Ravenswood Investment Co., L.P. v. Avalon Correctional Servs.*, 651 F.3d 1219, 1222, n.1 (10th Cir. 2011); *Sola Salon Studios, Inc. v. Heller*, 500 Fed. Appx. 723, 728, n.2 (10th Cir. 2012) (unpublished); *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998) (all citing *Navarro*)). Notably, the only two Plaintiffs that appealed the District Court order concurred that "the Americold Realty Trust's citizenship is determined by the citizenship of its trustees." App. at 5.

The Tenth Circuit rejected both parties' arguments. Distinguishing *Navarro*, the court reasoned that, because *Navarro* involved a suit brought by trustees and not the trust itself, it did not determine

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[2] That remains true to this day.

the rule for establishing the citizenship of a trust. Instead, the court opined that *Navarro* stood "for the far more limited proposition that if a trustee is a proper party to bring a suit on behalf of a trust, it is the trustee's citizenship that is relevant, rather than the trust's beneficiaries." App. at 7; *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 776 F.3d 1175, 1178 (10th Cir. 2015).

The court also relied on the decision in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), which "dictates that the citizenship of any non-corporate artificial entity is determined by considering all of the entity's members." *Id.* at 1180. The Tenth Circuit noted numerous other circuit courts have relied on *Navarro* – even after *Carden* – for the proposition that the citizenship of a trust is based on the citizenship of its trustees; the court stated that those holdings were unpersuasive because they did not explicitly discuss "how the Supreme Court's decision in *Carden* bears on the question." *Id.* at 1178.

In breaking from the majority of circuits, the Tenth Circuit distilled the following rule:

> When a trustee is a party to litigation, it is the trustee's citizenship that controls for purposes of diversity jurisdiction, as long as the trustee satisfies the real-party-in-interest test set out in *Navarro*. When the trust itself is party to the litigation, the citizenship of the trust is derived from all the trust's "members."

App. at 13-14 (776 F.3d at 1181). Further, the Tenth Circuit held that the trust's "members" included, at a minimum, its beneficiaries. When Americold Realty Trusts' beneficiaries are considered, its citizenship includes Kansas and is thus not diverse for jurisdictional purposes. *Id.* The court declined to "go any further and determine whether a trust's membership also includes its trustees," and remanded the case to the District Court to vacate its judgment and remand the matter to state court. *Id.* at 1182.

## REASONS FOR GRANTING THE WRIT

Trusts are critical actors in modern American commerce. Real estate investment trusts (REITs) like Americold Realty Trust hold approximately $1.7 trillion in gross assets. More than 70 million Americans invest in REITs through pension and retirement plans. More than 40,000 properties in the United States are owned by the 1,100 REITs that have filed tax returns in the United States.[3] And REITs represent only a small fraction of the total number of trusts conducting business in the United States today.

Despite the prevalence of trusts in commerce, federal courts currently employ different tests to determine whether those trusts may access federal

[3] *See* National Association of Real Estate Investment Trusts, *REITs by the Numbers* (2015), <www.reit.com/investing/reit-basics/reits-numbers>.

courts through diversity jurisdiction. Indeed, there are even pervasive intra-circuit and intra-district disagreements on the proper legal standards to employ. The Tenth Circuit's opinion further deepened that split – a split that cannot be resolved without this Court's intervention.

The deep split among the lower courts has reached critical mass. Although trusts are deeply engrained in today's business world, the federal court house remains shut for many trusts. The key to the door is based on who a Plaintiff decides to sue or where the lawsuit is filed. Uniformity is lacking, but necessary, for the orderly operation of the federal courts.

## I. This Court Has Emphasized That Trustees Are the Parties-in-Interest for Litigation Involving the Legal Rights and Responsibilities of a Trust.

The lower courts are stubbornly divided in their interpretation of the impact of two Supreme Court decisions on the question presented: *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980), and *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). In *Navarro*, individual trustees of real estate investment trust Fidelity Mortgage Investors brought a breach of contract suit against Navarro Savings Association for Navarro's alleged failure to cover its obligation to secure the loan of a debtor to the Fidelity trust. *Navarro Savs. Ass'n*, 446 U.S. at 458. The complaint,

filed in a Texas federal court, premised federal jurisdiction on diversity of citizenship. *Id.* at 459. Navarro was a Texas citizen and each Fidelity trustee was a citizen of another state. However, the parties stipulated that some of the *beneficiaries* of the Fidelity trust were citizens of Texas. *Id.* at 460. Concluding that a business trust is a citizen of every state in which its shareholders reside, the District Court dismissed the action for lack of subject matter jurisdiction. *Id.*

The Court of Appeals for the Fifth Circuit reversed. The court held the trustees were the real parties in interest to the litigation because they had full power to manage and control the trust; the District Court was directed to proceed to trial on the merits. 597 F.2d 421 (1979). Navarro appealed, and this Court granted certiorari to resolve the question "whether the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders." *Navarro Savs. Ass'n,* 446 U.S. at 458.

This Court held in an 8-1 opinion that the citizenship of the trustees, rather than the beneficiaries, controlled the diversity inquiry. The main reason was the real-party-in-interest doctrine: "[A] trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the

benefit of others." *Id.* at 464-65.[4] The Court contrasted that role with trust beneficiaries who "can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations." *Id.* at 465.

*Navarro* specifically rejected determining citizenship based on the location of the "9,500 beneficial shareholders" and further explained "[t]he residence of those who may have an equitable interest is simply irrelevant" for purposes of determining whether diversity exists. *Id.* at 463-64 (quoting *Bonnafee v. Williams*, 44 U.S. (3. How.) 574, 577 (1845)). Because the trustees had authority over the actions and business of the trust, the trustees "may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship without regard to the citizenship of the trust beneficiaries." *Id.* at 458. The holding in *Navarro* aligned with the long-held legal standard that permitted trustees to sue in their own right, "without regard to the citizenship of the trust beneficiaries." *Id.* at 466; *see also Bullard v. Cisco*, 290 U.S. 179, 190 (1933) (holding the extensive rights, powers, and duties assigned to committee members made them trustees and the parties in

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[4] That is plainly the role of Americold's trustees in the instant case. According to Americold's Articles of Amendment and Restatement Americold's trustees "full, exclusive and absolute power, control and authority over any and all property of the Trust." App. at 60-61.

interest, while "beneficiaries were not necessary parties and their citizenship was immaterial").

Lower courts uniformly applied the *Navarro* rule in holding trustees controlled the citizenship of a trust prior to this Court's decision in *Carden*. *See, e.g., Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986) ("Before the *Navarro* decision, lower courts had frequently held citizenship of the beneficiaries of a business trust relevant to determination of diversity jurisdiction. *Navarro* has clearly overruled these cases which relied on analogizing a business trust to an unincorporated association."); *Goldstick v. ICM Realty*, 788 F.2d 456, 458 (7th Cir. 1986) ("The citizenship of a trust is determined for purposes of diversity jurisdiction by the citizenship of the trustee"); *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1018 (4th Cir. 1985) ("only the citizenship of the trustee of a Massachusetts business trust had to be taken into account for purposes of diversity jurisdiction.").

A decade after *Navarro*, the Court disrupted that uniformity with *dicta* in a case that did not involve a trust or trustees. Rather, in *Carden*, the Court was confronted with a limited partnership suing guarantors of a lessee's obligation under a lease for drilling rigs. *Carden*, 494 U.S. at 186. The disputed issue in that case was whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine the citizenship of the partnership for diversity jurisdiction. *Id.*

The respondent Arkoma in *Carden* argued in part, by analogy, that "just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy" as in *Navarro*, "so also it should be taken into account for purposes of determining whether an artificial entity is a citizen." *Id.* at 192. The Court was not convinced, and a 5-4 majority held that, for the limited partnership at issue, "diversity jurisdiction in a suit by or against the entity depends on the citizenship of all the members," including the limited partners. *Id.* at 195. In *dicta*, the Court added gratuitously that *Navarro* addressed a suit by the trustees in their own names, not the trust itself, and did not necessarily decide the citizenship of the trust because the inquiry was ultimately about the diversity of the trustees as named parties. *Id.* at 192-93.

## II. The Lower Courts Are In Disarray in Determining the Citizenship of Trusts.

The lower courts have interpreted *Navarro* and *Carden* in drastically different ways. Most lower courts interpret *Carden* to recommend that they determine a trust's citizenship by reference to its trustees. *See, e.g., Ryan Int'l Airlines, Inc. v. East Trust SUB-2*, No. 10 C 50135, 2011 WL 893041, at *3 (N.D. Ill. Mar. 14, 2011) ("post-*Carden*, the Seventh Circuit has continued to apply a bright-line rule based on *Navarro* and, unlike the Third and Eleventh Circuits, is not convinced that *Carden* undermines *Navarro*."). However, other lower courts cite *Carden*

for a much different – and broader – proposition: that courts must consider the citizenship of *all* parties in a trust, including its beneficiaries or shareholders, to determine the citizenship of the trust itself. *See, e.g., Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192 (3d Cir. 2007) (applying *Carden* to a trust to hold that trustees and beneficiaries must be considered for a citizenship analysis). The split goes even deeper, though, as some courts apply variants on those rules whereby the citizenship of some but not all parties to a trust must be examined. For example, in some courts, the beneficiaries' citizenship is examined, while other courts look only to the shareholders (and *not* to the beneficiaries).

The split in the lower courts is openly acknowledged. *See, e.g., Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 200 (3d Cir. 2007) ("the court might determine the citizenship of a trust by selecting among four possible tests"); *General Retirement Sys. of the City of Detroit v. UBS AG*, No. 10-CV-13920, 2010 WL 5296957, at *3-4 (E.D. Mich. Dec. 20, 2010) ("Contrary to the law of the Second, Fifth, Sixth, Seventh and Ninth Circuits, the Third Circuit Court of Appeals held that the citizenship of both the trustee and beneficiary should control in determining the citizenship when the named party is the trust.").

The lower courts currently employ no fewer than four distinct rules to determine which parties must be considered in the citizenship determination of a trust: 1) trustees; 2) beneficiaries or shareholders; 3) *both*

trustees and beneficiaries; and 4) at least *either* trustees or beneficiaries. Moreover, the Wright & Miller treatise advocates for *yet another rule* – a case-by-case rule in which "[t]he citizenship of an active trustee, rather than that of the beneficiaries of the grantor, is decisive, but again a different result is reached with regard to a passive trustee who has only a naked legal title to the property." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3606 (2d ed. 1984).

In the twenty-five years since *Carden*, the circuit split has shown no signs of resolving itself. It has only gotten worse and splintered into "sub-splits" and even intra-district conflicts.[5] As one law-review article put

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[5] For example, Southern District of New York is awkwardly split in *three* different directions about how to determine the citizenship of trusts. *Compare Dargahi v. Hyman*, No. 05 Civ. 8500BSJ, 2007 WL 2274861 at *4 (S.D.N.Y. Feb. 9, 2007) ("Business trusts apparently have the citizenship of their trustees"), with *FMAC Loan Receivable Trust 1997-C v. Strauss*, No. 03 Civ. 2190(LAK), 2003 WL 1888673, at *2 (S.D.N.Y. Apr. 13, 2003) ("LBR has the citizenship of both its trustee and its beneficiaries"), and *Mills 2011 LLC v. Synovus Bank*, 921 F. Supp. 2d 219, 226 (S.D.N.Y. 2013) ("The Court finds the decision in Emerald well-reasoned and, in light of the Court's conclusion that the Second Circuit has not spoken on the question before it, believes that it states the correct rule regarding the citizenship of trusts for diversity purposes").

The Eastern District of Michigan is also split within itself. *Compare General Retirement System of the City of Detroit v. UBS AG*, No. 10-CV-13920, 2010 WL 5296957, at *4 (E.D. Mich. Dec. 20, 2010) ("when considering whether diversity jurisdiction exists, the citizenship of the trust should be determined by the citizenship of its trustee or trustees only."), *with JP Morgan*

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it, the confusion surrounding the citizenship of a trust has resulted in "mass confusion and dissention in lower courts." Jonathan J. Ossip, Note, *Diversity Jurisdiction and Trusts*, 89 N.Y.U. L. Rev. 2301, 2334 (2014). As demonstrated by the Tenth Circuit decision here, that confusion continues to strongly divide the lower courts. Further percolation serves no useful purpose.

### A. The Majority of Courts Hold Trustees Determine the Citizenship Determination of a Trust

The large majority of courts determine the citizenship of a trust by reference only to the trust's real parties in interest: the trustees.[6] These courts include

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*Chase Bank, N.A. v. Century Trust Co. of Mich.*, No. 10-cv-11877, 2010 WL 2556867, at *2 (E.D. Mich. June 22, 2010) ("The citizenship of a trust is determined by the citizenship of its trustees and its beneficiaries.").

[6] *See, e.g., Erlich v. Ouellette, Labonte, Roberge and Allen, P.A.*, 637 F.3d 32, 34, n.2 (1st Cir. 2011) ("a trust – which we presume the Fund to be – is in some cases a citizen of whatever states its trustees are citizens of"); *Grede v. Bank of New York Mellon*, 598 F.3d 899, 901 (7th Cir. 2010) ("only a trustee's citizenship counts"); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386 (5th Cir. 2009); *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("The citizenship of a trust is that of the trustee"); *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) ("A trust has the citizenship of its trustee or trustees."); *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002) ("For diversity purposes a trust is a citizen of whatever state the trustee is a citizen of."); *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, 53 Fed.Appx. 731,

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732 (6th Cir. 2002) ("a business trust has the citizenship of its trustees."); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 931 (2d Cir. 1998) ("The second possibility concerns trusts, as to which the Supreme Court has deemed the citizenship of the trustees to be determinative") (citing *Navarro Savings Ass'n*); *Goldstick v. ICM Realty*, 788 F.2d 456, 458 (7th Cir. 1986) ("The citizenship of a trust is determined for purposes of diversity jurisdiction by the citizenship of the trustee"); *New York State Teachers Retirement System v. Kalkus*, 764 F.2d 1015, 1018 (4th Cir. 1985) ("only the citizenship of the trustee of a Massachusetts business trust had to be taken into account for purposes of diversity jurisdiction."); *Watkins v. Trust Under Will of Bullitt ex rel. PNC Bank, N.A.*, No. 3:13-CV-01113-TBR, 2014 WL 2981016, at *3 (W.D. Ky. July 1, 2014) ("Regardless of the named plaintiff's identity, it is the trustee who possesses the authority to manage assets and make decisions on the trust's behalf. Therefore, the trustee is the real party."); *Liquidating Tr. of the App Fuels Creditors Trust v. W.Va. Alloys, Inc.*, No. 2:13-30266, 2014 U.S. Dist. LEXIS 57174, at *17-18 (S.D.W.V. Apr. 24, 2014) ("The test with respect to the citizenship of an entity is distinct from the test applied with respect to the citizenship of trustees if they sue in their own names. When trustees sue in their own names it is critical that they be the real parties to the controversy."); ("A trust has the citizenship of its trustee."); *Whitlock v. FSL Management, LLC*, No. 3:10CV-00562-JHM, 2012 WL 3109491 at *2 (W.D. Ky. July 31, 2012); *Schaftel v. Highpointe Bus. Trust*, No. WMN-11-2879, 2012 WL 219511, at *2 (D. Md. Jan. 24, 2012) ("For purposes of diversity jurisdiction, the court looks to the citizenship of its trustee"); *Ryan Int'l Airlines, Inc. v. East Trust SUB-2*, No. 10 C 50135, 2011 WL 893041, at *3 (N.D. Ill. Mar. 14, 2011) ("Post-*Carden*, the Seventh Circuit has continued to apply a bright-line rule based on *Navarro* and, unlike the Third and Eleventh Circuits, is not convinced that *Carden* undermines *Navarro*."); *General Retirement System of the City of Detroit v. UBS AG*, No. 10-CV-13920, 2010 WL 5296957, at *4 (E.D. Mich. Dec. 20, 2010) ("When considering whether diversity jurisdiction exists, the citizenship of the trust should be determined by the citizenship of its trustee or trustees only."); *Feiner Family Trust v. VBI Corp.*, No.

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the First, Fourth, Fifth, Sixth, Seventh, and Ninth Courts of Appeals and at least a dozen District Courts. These courts extend the reasoning of *Navarro* to include trusts, citing *Navarro* when holding that the citizenship of trustees determine the citizenship of the trust. *See, e.g., Mills 2011 LLC v. Synovus Bank*, 921 F. Supp. 2d 219, 222 (S.D.N.Y. 2013) ("A number of Circuit Courts of Appeals have cited *Navarro* for the broad proposition that the citizenship of a trust is determined by its trustees."). These courts reject the argument that *Carden* extended the citizenship inquiry beyond the trustees. *See, e.g., Ryan Intern. Airlines, Inc. v. East Trust SUB-2,* No. 10 C 50135, 2011 WL 893041 at *3 (N.D. Ill. Mar. 14, 2011)

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07 Civ. 1914(RPP), 2007 WL 2615448, at *3 (S.D.N.Y. Sept. 11, 2007) ("For purposes of diversity, a trust is a citizen of the state where its trustee is domiciled"); *Dargahi v. Hyman*, No. 05 Civ. 8500BSJ, 2007 WL 2274861, at *4 (S.D.N.Y. Feb. 9, 2007) ("Business trusts apparently have the citizenship of their trustees"); *Bostic Dev. at Lynchburg LLC v. Liberty University, Inc.*, No. Civ.A.6:05 CV 00013, 2005 WL 2065251, at *1 (W.D. Va. Aug. 25, 2005) ("It is the citizenship of the trustee, and not of the beneficiary, that is relevant because when a trustee possesses certain customary powers to hold, manage, and dispose of a trust's assets, he is the real party to the controversy."); *Boyd Machine & Repair Co., Inc. v. Freedman*, No. 1:03-CV-57, 2003 WL 21919214, at *1 (N.D. Ind. Mar. 7, 2003) ("Citizenship is the citizenship of all the trustees, rather than the beneficiaries"); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F. Supp. 425 (N.D. Ga. 1975) ("If it is treated as a traditional trust, with its citizenship deemed to be that of each of its trustees, then diversity exists"); *In re Mortgages Ltd.*, 452 B.R. 776, 776 (D. Ariz. 2011) ("Citizenship of trustee, as real party in interest, was controlling in determining existence of diversity jurisdiction").

("post-*Carden*, the Seventh Circuit has continued to apply a bright-line rule based on *Navarro* and, unlike the Third and Eleventh Circuits, is not convinced that *Carden* undermines *Navarro*.").

From 1986 until as recently as 2010, the Seventh Circuit has consistently held the citizenship of a trust is determined by the citizenship of its trustees. For example, in *May Department Stores*, the court considered a diversity suit for breach of contract of liability insurance brought by an ERISA pension plan and the company that sponsored and administered the plan. *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002). The court raised *sua sponte* the question of whether the May pension plan, a trust, was diverse for jurisdictional purposes. Judge Richard Posner emphasized the Seventh Circuit's rule: "[F]or diversity purposes a trust is a citizen of whatever state the trustee is a citizen of." *Id.* at 599 (citing *Navarro Savings Ass'n*, 466 U.S. at 464-66). The parties in this case were not diverse, according to the Seventh Circuit, because a trustee of the May plan was a citizen of the same state as another party. *Id.*

Judge Frank Easterbrook echoed that same rule in a 2006 case in which an engineering company with trusts in its corporate structure sued a competing company for alleged violations of Wisconsin's trade secret act. *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). In discussing those trusts, the court emphasized that "[t]he citizenship of a trust is that of the trustee." *Id.* at 348. Judge Easterbrook reiterated that rule four years later in *Grede v. Bank*

*of New York Mellon*, 598 F.3d 899, 901 (7th Cir. 2010) ("[A] trust's citizenship is that of the trustee, rather than the beneficiaries, for the purpose of 28 U.S.C. § 1332(a). . . . only a trustee's citizenship counts.")

The Fifth Circuit has also held a trust's citizenship depends on the citizenship of its trustees. In *Mullins v. Test America, Inc.*, 564 F.3d 386 (5th Cir. 2009), a prior owner of a Texas company sued the entity that purchased his company for breach of contract and fraud. On initial appeal, the court *sua sponte* raised the issue of subject matter jurisdiction regarding the citizenship of party Sagaponack, a partnership with one general partner and multiple limited partners, including three trusts. *Id.* at 397. The Fifth Circuit examined the citizenship of each of the 32 relevant partners, determining that the citizenship of the three trusts were that of their trustees. *Id.* at 397, n.6 (citing *Navarro*). Notably, the Fifth Circuit considered the Court's decision in *Carden* in this holding, citing *Carden* in its reasoning that the partnership must distinctly and affirmatively allege the citizenship of all its general and limited partners, information crucial to determining whether diversity jurisdiction existed. *Id.* (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990)).

The Second Circuit employs the same rule. In *E.R. Squibb & Sons, Inc. v. Accident & Casualty Insurance Co.*, 160 F.3d 925 (1998), the Second Circuit considered diversity jurisdiction for a group of insurers including Lloyd's of London in a case regarding insurance policies provided by the appellants. The

parties urged the court to apply the rule in *Navarro* – that the trustees control the citizenship of the trust – to the lead underwriter of Lloyd's, because the Lloyd's market is a trust and the lead underwriter acted as a trustee. *Id.* at 931. The Second Circuit agreed with the parties that the citizenship of the trustee controls the citizenship of the trust as a whole, but held that underwriters were not similar to trustees in that "[t]rustees *own* the corpus" while "underwriters do not own [the insurance policy's] wealth or exercise over it any dominion other than the power to underwrite risks." *Id.* (emphasis in original) (citing *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998)).

Similarly, the Ninth Circuit applies the rule in diversity cases that the citizenship of a trust is dependent on the citizenship of its trustees. *See Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). In that case, a limited partnership with a trust in its corporate structure sued a corporation for failure to pay for crane services provided in connection with the construction of a hotel. *Id.* at 896. In determining the citizenship of the parties, the court held "[a] trust has the citizenship of its trustee or trustees." *Id.* at 899 (citing *Navarro Sav. Ass'n*, 446 U.S. at 464). The court held that jurisdiction was proper based on the citizenship of the trustees. *Id.*

The First Circuit, in *Erlich v. Ouellette, Labonte, Roberge and Allen, P.A.*, 637 F.3d 32 (1st Cir. 2011), addressed when the state-law causes of action of a pension fund against an auditor and actuary accrued.

In its analysis of the parties' diversity, the court cited *Navarro* for the proposition that the pension fund, as a trust, is a "citizen of whatever states its trustees are citizens of." *Id.* at 34, n.2 (also citing *Appleyard v. Douglass,* 141 F.3d 1149, 1998 WL 104680, at *2 (1st Cir. 1998) (unpublished table decision) (dicta)). The parties here were diverse under that analysis.

The Sixth Circuit addressed this issue in *Homfeld II LLC v. Comair Holdings, Inc.*, 53 Fed. Appx. 731 (6th Cir. 2002). In that case, a holding company backed out of its acquisition agreement with an airline, which led to a suit against that company by the third party entities that leased planes to the airline. The court conducted a preliminary jurisdictional analysis of the leasing companies, which included two limited liability companies and a business trust. *Id.* at 732. The leasing companies failed to allege the citizenship of their members and trustees, which was required to establish diversity because, the court held, "a limited liability company is not treated as a corporation and has the citizenship of its members, and a business trust has the citizenship of its trustees." *Id.* (citing *Cosgrove v. Bartolotta,* 150 F.3d 729, 731 (7th Cir. 1998); *Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 464 (1980)).

The majority of District Courts likewise hold the citizenship of a trust depends on the citizenship of its trustees. For example, the Western District of Virginia directly addressed the diversity of citizenship for the parties using reasoning from both *Carden* and *Navarro. Bostic Development at Lynchburg LLC v.*

*Liberty University, Inc.*, No. Civ.A.6:05 CV 00013, 2005 WL 2065251 (W.D. Va. Aug. 25, 2005). One of the members of a constituent LLC was an investment trust. *Id.* The court explained "the citizenship of a partnership or other unincorporated entity is defined by the citizenship of its members" as described in *Carden*. *Id.* at *1. The court cited *Navarro* in holding "when determining jurisdiction citizenship for the trust, courts look to the citizenship of the trustee who maintains it." *Id.* The court further explained: "It is the citizenship of the trustee, and not of the beneficiary, that is relevant because when a trustee possesses certain customary powers to hold, manage, and dispose of a trust's assets, he is the real party to the controversy." *Id.* The court dismissed the claim for the party's failure to properly plead the citizenship of its trustee. *Id.* at *2.

Likewise, the Northern District of Illinois relied on both *Carden* and *Navarro* holding the citizenship of a trust is determined by reference to its trustees. *Ryan Intern. Airlines, Inc. v. East Trust SUB-2*, No. 10 C 50135, 2011 WL 893041 (N.D. Ill. Mar. 14, 2011). The trust asserted it had the citizenship of all its members and beneficiaries, and that diversity was compromised because one of its beneficiaries shared citizenship with another party. *Id.* The court discussed the holding in *Navarro*, explaining the trustees who had legal title, managed the assets, and controlled the litigation, were the real parties to the controversy, as opposed to the beneficiaries of the trust. *Id.* The court explained that, using the reasoning in

*Navarro* even after the Supreme Court decided *Carden*, "the Seventh Circuit has consistently held that the citizenship of a trust for purposes of § 1332(a) diversity jurisdiction is that of the trustee." *Id.* at *3 (quoting *Carden v. Arkoma Associates*, 494 U.S. 185, 192-93 (1990)). Because the trustees were of diverse citizenship, the motion to dismiss was denied. *Id.*; *see also, e.g., Quantlab Fin., LLC v. Tower Research Capital, LLC,* 715 F. Supp. 2d 542 (S.D.N.Y. 2010) ("While neither the Supreme Court nor the Court of Appeals for the Second Circuit has squarely addressed the question of how to determine the citizenship of a trust for diversity jurisdiction purposes, precedent suggests that a court must look, at least in part, to the citizenship of the trust's trustee or trustees.").

### B. A Minority of Courts Consider Other Entities for Citizenship Determination.

A minority of courts hold other parties to a trust are also relevant – or *instead* relevant – for determining the citizenship of a trust. Differing approaches seem to proliferate with each passing year. Amidst the chaos spawned by *Carden*'s *dicta*, lower courts have splintered in different, conflicting directions on the method of determining the citizenship of a trust:

### 1) Courts Holding Beneficiaries Determine Citizenship

A minority of courts hold a trust's citizenship is determined *not* by reference to its trustees, but instead by the citizenship of the trust's beneficiaries or shareholders.

The Eleventh Circuit adopted this approach in *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (2002). In that case, trustees of a profit sharing plan filed a class action against the operator of a business trust. The court conducted the threshold jurisdictional inquiry, and held that, "like the limited partnership in *Carden*, [the fund trust] is to be treated as a citizen of each state in which one of its shareholders is a citizen." *Id.* at 1339. The court did not look to the citizenship of trustees. Instead, it held diversity was lacking because some of its shareholders resided in Florida and were not diverse. *Id.* ("There was no diversity jurisdiction in suit brought by Florida citizen against business trust since some of the trust's shareholders were Florida citizens.").[7]

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[7] The Eleventh Circuit reiterated this holding in *Bumble Bee Crook-Petite-El v. Bumble Bee Seafoods L.L.C.*, 502 Fed. Appx. 886 (11th Cir. 2012). In that case, a *pro se* individual appealed a District Court dismissal of a tort action as time-barred against an LLC, and the Eleventh Circuit reviewed diversity jurisdiction *sua sponte*. *Id.* at 887. The court restated the rule established in *Riley* that "[c]itizenship of an unincorporated business trust is to be determined on the basis of the citizenship of its shareholders." *Id.* Because the appellant did not allege the identity or citizenship of any of Bumble Bee's

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Some District Courts have adopted this methodology. The District Court for the District of Columbia examined a case between a citizen of Taiwan and a trust, also naming that trust's trustee and beneficiary. *See Yueh-Lan Wang ex rel. Wong v. New Mighty U.S. Trust*, 841 F. Supp. 2d 198 (D.D.C. 2012). The Plaintiff's deceased husband, Yung-Ching Wang, was the second wealthiest person in Taiwan with an estimated net worth of $6.8 billion, and the Plaintiff was suing to establish her right to trust funds as a surviving spouse. *Id.* at 200. The Plaintiff alleged the citizenship of the trust was Virginia and/or the District of Columbia, based on the citizenship of the sole trustee. *Id.* at 203. Defendants contended the citizenship of the trust was that of both the trustees and the beneficiaries. *Id.* The court held that, "[a]lthough it is a close question on which federal courts appear to be divided," it would consider only the beneficiaries' citizenship to determine the citizenship of the trust. *Id.* at 203, 205. *See also, e.g., San Juan Basin Royalty Trust v. Burlington Resources Oil, Gas Co., L.P.*, 588 F. Supp. 2d 1274, 1276 (D.N.M. 2008) ("In this case the Court finds that the citizenship of the Trust's beneficiaries must be taken into account for purposes of determining whether diversity jurisdiction exists.").

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shareholders, the court remanded the case for a diversity determination. *Id.* at 887-88.

### 2) Courts Holding Beneficiaries *and* Trustees Determine Citizenship

Another group of courts determine the citizenship of a trust by reference to the citizenship of *both* its trustees and beneficiaries. The Third Circuit and several District Courts apply this rule.

In *Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192 (3d Cir. 2007), an investment trust invoked diversity jurisdiction to bring a federal action seeking recovery on two unpaid promissory notes and foreclosure of mortgages against a development company. The court examined *Navarro*, *Carden*, and other cases that addressed the citizenship of a trust, concluding the court might determine the citizenship of a trust by selecting among four possible tests: "(a) look to the citizenship of the trustee only; (b) look to the citizenship of the beneficiary only; (c) look to the citizenship of either the trustee or the beneficiary depending on who is in control of the trust in the particular case; or (d) look to the citizenship of both the trustee and the beneficiary." *Id.* at 201. The court held that it must "look to the citizenship of both the trustee and the beneficiary in all cases in which a trust is a party." *Id.* at 203. The Emerald Trust only had a single beneficiary – the British Virgin Islands corporation, Emerald Investors Ltd. – and as such the parties were diverse.

Some District Courts have applied the Third Circuit's rule.[8] In *Mecklenburg Cnty. v. Time Warner Entm't-Advance/Newhouse P'ship*, No. 3:05CV333, 2010 WL 391279 (W.D.N.C. Jan. 26, 2010), the District Court, *sua sponte*, challenged whether a defendant partnership with a trust in its corporate

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[8] *See, e.g., Mills 2011 LLC v. Synovus Bank*, 921 F. Supp. 2d 219, 226 (S.D.N.Y. 2013) ("The Court finds the decision in *Emerald* well-reasoned and, in light of the Court's conclusion that the Second Circuit has not spoken on the question before it, believes that it states the correct rule regarding the citizenship of trusts for diversity purposes"); *PDP La Mesa LLC v. LaSalle Med. Office Fund II*, No. 10cv1536 DMS (RBB), 2010 WL 3988598, at *3 (S.D. Cal. Oct. 12, 2010) ("The citizenship of both the trustee and the beneficiary should control in determining the citizenship of a trust."); *1963 Jackson, Inc. v. De Vos*, No. 1:10-01206-STA-dkv, 2010 WL 5093354, at *3 (W.D. Tenn. Oct. 8, 2010) ("This court concludes that the 'dual trustee-beneficiary rule' should be applied."); *JP Morgan Chase Bank, N.A. v. Century Trust Co. of Mich.*, No. 10-cv-11877, 2010 WL 2556867, at *2 (E.D. Mich. June 22, 2010) ("The citizenship of a trust is determined by the citizenship of its trustees and its beneficiaries."); *Mecklenburg County v. Time Warner Entm't-Advance/Newhouse P'ship*, No. 3:05CV333, 2010 WL 391279, at *3 (W.D.N.C. Jan. 26, 2010) ("The Court must conclude as a matter of law that the citizenship of the trustees as well as the beneficiaries must be diverse in order for jurisdiction to lie in this Court."); *Arias v. Budget Truck Tr. I*, No. 09 Civ. 0774 (BMC), 2009 U.S. Dist. LEXIS 18706, at *1-2 (E.D.N.Y Mar. 5, 2009) ("When the citizenship of an unincorporated business entity – there, like defendant here, a business trust – the citizenship of each of its partners, members, or beneficiaries, as the case may be, is imputed to the entity for diversity purposes and must be alleged."); *FMAC Loan Receivable Trust 1997-C v. Strauss*, No. 03 Civ. 2190 (LAK), 2003 WL 1888673, at *2 (S.D.N.Y. Apr. 13, 2003) ("LBR has the citizenship of both its trustee and its beneficiaries.")

structure was diverse. The court recognized "[t]he citizenship of a trust for diversity purposes does not appear to be a settled issue," and cited *Carden* for the proposition that diversity jurisdiction depends on the citizenship of "all the members, the several persons composing such association." *Id.* at *3. The District Court found the reasoning in *Emerald* compelling, holding "it is a complete distortion of reality to argue that the beneficiaries alone constitute the several persons composing such association" because "[w]ithout the trustees, the association – and the trust as a separate business entity – would not exist." *Id.* As such, the court held that the citizenship of trustees *and* beneficiaries must be diverse in order for jurisdiction to be appropriate in that court. *Id.*

Similarly, one judge in the Southern District of New York applied the Third Circuit's rule from *Emerald*. *See Mills 2011 LLC v. Synovus Bank,* 921 F. Supp. 2d 219 (S.D. N.Y. 2013). In that case, Mills challenged the defendant's invocation of diversity jurisdiction because the beneficiary of a trust in its corporate structure was a citizen of Georgia, like the defendant bank. Defendant relied on *Navarro* to argue the citizenship of the Mills trust depended on the citizenship of its trustees, not its Georgia citizen beneficiary. The court acknowledged that "[a] number of Circuit Courts of Appeals have cited *Navarro* for the broad proposition that the citizenship of a trust is determined by its trustees," but Judge Nathan did not think the *Carden* decision supported that holding. *Id.* at 222. The court was persuaded that *Emerald*

"states the correct rule regarding the citizenship of trusts for diversity purposes." *Id.* at 226.

## III. This Case Presents a Question of Public Importance that Recurs Frequently.

Because trusts are so commonly involved in business – and thus, business disputes – a clear rule is needed for lower courts to conduct the threshold inquiry into a trust's citizenship for purposes of establishing diversity jurisdiction. Without this Court's intervention, the chaos in the lower courts will only worsen. For the thousands of trusts that are parties to litigation, courts across the country apply different rules to determine a trust's citizenship. The resulting hodge-podge of jurisdictional rules leads to forum-shopping and a fundamental unfairness in the availability of federal jurisdiction to similarly situated parties.

This Court has long held that "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction." *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). The requirement that jurisdiction be "established as a threshold matter" is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1997). Complicated, unclear jurisdictional tests introduce expensive and unnecessary delays in many

of the hundreds of cases filed *every day* in federal courts that invoke diversity jurisdiction.[9]

In the context of trusts and diversity jurisdiction, the most logical and efficient rule is to consider the citizenship of the party-in-interest. The parties-in-interest for a trust are necessarily the trustees. *See, e.g., Watkins v. Trust Under Will of Bullitt ex rel. PNC Bank, N.A.*, No. 3:13-CV-01113-TBR, 2014 WL 2981016 (W.D. Ky. July 1, 2014) ("This Court agrees that the *Carden dictum* remains consistent with the long-held principle that the citizenship of the real party in interest determines the citizenship of the trust, and that for trusts, the real party in interest is the trustee."). Trustees carry out the day-to-day business of the trust, manage the trust, and dispose of its assets. In contrast, beneficiaries of a trust, which can number in the thousands, as seen in *Navarro*, may not even be aware that the trust and/or each other exists. Beneficiaries generally have no control over the trust and no ability to direct its functions. Allowing parties with no control over a trust to determine that trust's citizenship for diversity-jurisdiction purposes would be illogical and unfair.

A common-sense rule like this would also eliminate forum-shopping and the inadvertent unfairness caused in this case by Plaintiffs' decision to sue the trust itself rather than its trustees. If Plaintiffs had

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[9] *See* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2013/Table409.pdf>.

named Americold's Trustees as defendants, that would have occasioned a straight-forward application of *Navarro* and a finding of complete diversity of citizenship in this case. By contrast, Plaintiffs' naming of the trust itself occasioned application of a *different* test of citizenship by the Tenth Circuit, which destroyed diversity. It is not difficult, however, to discern that the application of different tests will encourage forum-shopping when opportunistic Plaintiffs want to ensure that litigation remains in particularly friendly state-court jurisdictions of their choice (often before elected judges). *See, e.g. Watkins v. Trust Under Bullit*, 2014 WL at *5.

This case presents a perfect vehicle through which to reject such unfair practices. The instant lawsuit is the *fourth* iteration of a legal dispute that has been mired in the Kansas state court system for nearly *twenty-five years*. Without resort to federal jurisdiction, there is every reason to believe that Americold will be consigned to many years of continuing litigation and possibly need to seek relief from the Kansas Supreme Court for a *fourth* time in this dispute.

Moreover, this is a "clean" vehicle through which to address the operative legal question. It is a pure question of law, and the result turns entirely on *which* test the Court chooses to determine a trust's citizenship: If the citizenship of Americold's beneficiaries or shareholders is considered, there is no complete diversity of citizenship; if only the trustees' citizenship is considered, complete diversity of citizenship

will exist. Further percolation serves no useful purpose. This Court should take this opportunity to resolve a legal issue that has split the lower courts badly – including intra-circuit and intra-district splits – and that is incapable of resolving on its own.

## CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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PUBLISH

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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|---|---|
| CONAGRA FOODS, INC., formerly known as Conagra, Inc.; SWIFT-ECKRICH, INC.,<br>Plaintiffs-Appellants,<br>and<br>KRAFT FOODSERVICE, INC.; SAFEWAY, INC.; PHILLIPS CONNECTIONS, INC., doing business as Phillips Connections and Hanover, Inc.,<br>Plaintiffs,<br>v.<br>AMERICOLD LOGISTICS, LLC; AMERICOLD REALTY TRUST,<br>Defendants-Appellees. | No. 13-3277 |

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**
**(D.C. NO. 2:13-CV-02064-JWL-KGS)**

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(Filed Jan. 27, 2015)

John M. Duggan (Deron A. Anliker and Andrew I. Spitsnogle, with him on the briefs), Duggan Shadwick Doerr & Kurlbaum LLC, Overland Park, Kansas, for Plaintiffs-Appellants.

Michael D. Pospisil (John M. Edgar with him on the briefs), Edgar Law Firm LLC, Kansas City, Missouri, for Defendants-Appellees.

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Before **LUCERO**, **MURPHY**, and **McHUGH**, Circuit Judges.

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**MURPHY**, Circuit Judge.

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## I. INTRODUCTION

Is the citizenship of a trust determined by exclusive reference to the citizenship of its trustees? According to *Carden v. Arkoma Associates,* 494 U.S. 185 (1990), the answer to this question is "no." The citizenship of a trust, just like the citizenship of all other artificial entities except corporations, is determined by examining the citizenship "of all the entity's members." *Id.* at 195. That being the case, the district court lacked subject matter jurisdiction over the suit underlying this appeal. This court **remands** the matter to the district court to vacate its judgment on the merits and remand the matter to state court.

## II. BACKGROUND

Multiple plaintiffs, including ConAgra Foods, Inc. and Swift-Eckrich, Inc., brought suit in Kansas state court against Americold Logistics, LLC and Americold Realty Trust (the "Americold entities"). The Americold entities removed the case to the United States District Court for the District of Kansas. As the basis for removal, the Americold entities asserted[1] the parties were completely diverse.[2] *See* 28 U.S.C.

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[1] The notice of removal is not part of the record on appeal. "Nevertheless, we have authority to review [that document] because we may take judicial notice of public records, including district court filings." *Guttman v. Khalsa*, 669 F.3d 1101, 1127 n.5 (10th Cir. 2012).

[2] The notice or removal averred as follows:

> 4. Plaintiffs are all incorporated in Delaware.
>
> 5. Americold Realty Trust is a Maryland real estate investment trust. . .
>
> 6. None of the Plaintiffs have their principal place of business in Maryland.
>
> 7. Americold Logistics, LLC is a limited liability company. [F]or purposes of diversity jurisdiction, a limited liability company is treated as a limited partnership. The citizenship of a limited partnership "is deemed to be that of the persons composing such association."
>
> 8. Americold Logistics, LLC is a wholly owned subsidiary of Americold Realty Trust.
>
> 10. Neither Americold Logistics, LLC nor Americold Realty Trust is a citizen of Kansas, the forum state.

§ 1441(b). No party challenged the propriety of removal; the district court did not address the issue. The merits of the suit were submitted to the district court on cross-motions for summary judgment. The district court granted summary judgment to the Americold entities. ConAgra and Swift-Eckrich brought a timely merits appeal.

After the parties filed their merits briefs, this court noted a potential jurisdiction defect in the notice of removal. *See Qwest Corp. v. Pub. Utils. Comm'n of Colo.*, 479 F.3d 1184, 1191 (10th Cir. 2007) (holding this court has "an independent duty to ensure that the district court[ ] properly asserted jurisdiction" (quotation omitted)). We ordered the Americold entities to file a supplemental brief addressing the following two questions:

> 1. Was the [Americold entities'] Notice of Removal sufficient to establish diversity jurisdiction in that the Notice did not establish the citizenship of the beneficial shareholders or beneficiaries of the Americold Realty Trust?
>
> 2. If the Notice of Removal did not establish diversity jurisdiction, what curative facts, if any, may the [Americold entities] aver to correct this defect in this appeal?

In their supplemental brief, the Americold entities assert the omission of the citizenship of the beneficiaries of Americold Realty Trust from the notice of removal is not a jurisdictional defect because a trust's citizenship is determined exclusively by the

citizenship of its trustees. In support of this assertion, they rely on *Navarro Savings Ass'n v. Lee,* 446 U.S. 458 (1980). They further assert that, although there is a split of authority on this issue, the approach they advocate is the majority position. Finally, they contend this court has, "on at least three occasions, indicated that under *Navarro,* where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity." Appellees' Supplemental Br. at 3 (citing *Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs.*, 651 F.3d 1219, 1222 n.1 (10th Cir. 2011); *Sola Salon Studios, Inc. v. Heller,* 500 F. App'x 723, 728 n.2 (10th Cir. 2012) (unpublished); *Lenon v. St. Paul Mercury Ins. Co.,* 136 F.3d 1365, 1371 (10th Cir. 1998)). ConAgra Foods and Swift-Eckrich concur in the analysis set out in the Americold entities' supplemental brief.

## III. ANALYSIS

Because it is the lynchpin of the parties' arguments in favor of diversity jurisdiction, this court starts with the Supreme Court's decision in *Navarro.* In *Navarro,* trustees of a "business trust," suing in their own names, brought an action in federal district court for breach of contract. 446 U.S. at 459. The defendants disputed the existence of diversity jurisdiction, claiming the beneficiaries were the real parties to the controversy and the citizenship of the beneficiaries, from whom the defendants were not diverse, should control. *Id.* at 459-60. *Navarro* described the controlling question as follows: "[W]hether

the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders." *Id.* at 458.

To answer that question, the Court began by recognizing a long-established principle of diversity jurisdiction: "[T]he 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Id.* at 460. The Court also recognized that, with the exception of corporations, "only persons could be real parties to the controversy." *Id.* at 461. Thus, when persons composing an unincorporated association "sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction." *Id.* Nevertheless, the Court noted, *Navarro* did not involve a suit by an unincorporated association. *Id.* at 462. Because the suit was brought by the trustees in their own name, the question was whether the trustees were "real parties to th[e] controversy." *Id.* On that point, the Court identified almost two centuries of precedent dictating "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Id.* at 464.

The trust at issue in *Navarro* gave the trustees exclusive authority over trust property. *Id.* at 459. The declaration of trust "authorized the trustees to take legal title to trust assets, to invest those assets for the benefit of the shareholders, and to sue and be

sued in their capacity as trustees." *Id.* at 464. The shareholders, in contrast, did not have any such authority. *Id.* All this being the case, the Court concluded the trustees in *Navarro* could "sue in their own right, without regard to the citizenship of the trust beneficiaries." *Id.* at 465-66.

As noted by the parties in this appeal, several circuits have relied on *Navarro* for the proposition that, for diversity purposes, the citizenship of a trust is based on the citizenship of its trustees. *See, e.g., Mullins v. TestAmerica, Inc.,* 564 F.3d 386, 397 n.6 (5th Cir. 2009); *Johnson v. Columbia Props. Anchorage, L.P.,* 437 F.3d 894, 899 (9th Cir. 2006); *May Dept. Stores Co. v. Fed. Ins. Co.,* 305 F.3d 597, 599 (7th Cir. 2002); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.,* 160 F.3d 925, 931 (2d Cir. 1998). The problem for the parties, however, is that none of these circuits have addressed how the Supreme Court's decision in *Carden* bears on this question. That is, in each of the cases identified above, the court cited uncritically to *Navarro* as establishing that a trust always has the citizenship of its trustees, without regard to whether it was the trust or the trustee that was the party to the suit. As *Carden* makes clear, however, Navarro does not support such a broad proposition. Instead, *Navarro* stands for the far more limited proposition that if a trustee is a proper party to bring a suit on behalf of a trust, it is the trustee's citizenship that is relevant, rather than the trust's beneficiaries. *Carden,* 494 U.S. at 188 n.1, 191-92. When the trust itself is a party to litigation, however,

the trust's citizenship is derived from the citizenship of all it [sic] members. *Id.* at 192-94.

The question before the Court in *Carden* was the following: "[W]hether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." *Id.* at 186. The answer to that question, according to the Court, depended on two subsidiary questions: whether (1) "a limited partnership may be considered in its own right a 'citizen' of the State that created it"; or (2) a federal court must focus exclusively on a limited partnership's general partners in determining whether complete diversity of citizenship exists. *Id.* at 187. In answering these questions, *Carden* made clear *Navarro* did not in any way address the question of how a court should determine the citizenship of an *entity* that is a party to a lawsuit.

*Carden* begins its analysis of the first subsidiary question – whether a limited partnership could be considered a citizen of the state that created it – by recognizing the Court had, as a matter of historical anomaly, long treated corporations as citizens of their creator states. *Id.* at 187-88, 196-97. By equally long-standing tradition, however, the Court "just as firmly resisted extending that treatment to other entities." *Id.* at 189. The limited partnership argued, however, that Navarro represented an exception to this rule. The Court rejected this proposition and, in so doing, held Navarro simply did not address the question of how to determine the citizenship of a trust. *Id.* at

191-92. Instead, *Navarro* addressed the far more limited question of "whether parties that were undoubted 'citizens' (viz., natural persons) were the real parties to the controversy." *Id.* at 191. And, in the opening footnote of its opinion, the *Carden* majority made clear that the test for determining whether any particular party had a real interest in the litigation is *not* coextensive with the determination of the citizenship of an artificial entity:

> The dissent reaches a conclusion different from ours primarily because it poses, and then answers, an entirely different question. It "do[es] not consider" "whether the limited partnership is a 'citizen,'" but simply "assum[es] it is a citizen," because even if we hold that it is, "we are still required to consider which, if any, of the *other citizens before the Court* as members of Arkoma Associates are real parties to the controversy." Furthermore, "[t]he only potentially nondiverse *party* in this case is a limited partner" because "[a]ll *other parties,* including the general partners and the limited partnership itself, assuming it is a citizen, are diverse."
>
> That is the central fallacy from which, for the most part, the rest of the dissent's reasoning logically follows. The question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, a question that will generally be answered by application of the "real party to the controversy"

> test. There are *not,* as the dissent assumes, multiple respondents before the Court, but only *one:* the artificial entity called Arkoma Associates, a limited partnership. And what we must decide is the quite different question of how the citizenship of that single artificial entity is to be determined – which in turn raises the question whether it can (like a corporation) assert its own citizenship, or rather is deemed to possess the citizenship of its members, and, if so, which members. The dissent fails to cite a single case in which the citizenship of an artificial entity, the issue before us today, has been decided by application of the "real party to the controversy" test that it describes.

*Id.* at 187 n.1 (citations omitted).

Having rejected the contention a non-corporate artificial entity could be a citizen in its own right, *Carden* moved on to the question whether the citizenship of such an entity could be determined based on "the citizenship of some but not all of its members." *Id.* at 192. *Carden* answered that question with an emphatic "no." *Id.* at 192-96. The Court again rejected the notion that *Navarro* was relevant to the question:

> To support its approach, Arkoma seeks to press *Navarro* into service once again, arguing that just as that case looked to the trustees to determine the citizenship of the business trust, so also here we should look to the general partners, who have the management powers, in determining the citizenship

> of this partnership. *As we have already explained, however, Navarro had nothing to do with the citizenship of the "trust," since it was a suit by the trustees in their own names.*

*Id.* at 192-93 (emphasis added). After surveying more than a century of Supreme Court precedent, *Carden* distilled the following rule for determining the citizenship of a non-corporate artificial entity:

> [W]e reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of all the members, the several persons composing such association, each of its members.

*Id.* at 195-96 (citations and quotations omitted).

The two circuits that have actually grappled with the question of how *Carden* and *Navarro* interact have ultimately determined (1) *Navarro* does not speak to the question of how to determine the citizenship of a trust and (2) *Carden* dictates that the citizenship of any non-corporate artificial entity is determined by considering all of the entity's members. *See Emerald Investors Trust v. Gaunt Parsippany Partners,* 492 F.3d 192, 200-01 (3d Cir. 2007); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 292 F.3d 1334, 1337-40 (11th Cir. 2002), *overruled in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith v. Dabit,* 547 U.S. 71, 89 (2006). The Americold

entities assert, however, this court is bound to accept the majority approach and read *Navarro* as standing for the proposition that the citizenship of a trust is always determined by examining the citizenship of the trustees. In support of this proposition, they say this court has, "on at least three occasions, indicated that under *Navarro,* where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity." Appellees' Supplemental Br. at 3 (citing *Ravenswood,* 651 F.3d at 1222 n.1; *Sola Salon,* 500 F. App'x at 728 n.2; *Lenon,* 136 F.3d at 1371). None of these three cases support the Americold entities' assertions.

In *Ravenswood,* the parties conceded on appeal that subject matter jurisdiction was lacking because the parties were not completely diverse. 651 F.3d at 1222. The only question in the case was whether the district court had remedied the jurisdictional defect when it severed both claims and parties in the middle of the litigation. *Id.* at 1223. In a footnote, this court concluded it was unnecessary to resolve whether the citizenship of a trust was based on the citizenship of its trustees, beneficiaries, or some combination thereof because "[u]nlike a situation in which both parties erroneously assert federal jurisdiction exists thereby triggering this court's sua sponte obligation to examine its own jurisdiction, there is no need to decide the propriety of the parties' agreement that diversity jurisdiction does not exist because it presents no concern a federal court will exceed its power." *Id.* at 1222 n.1. Accordingly, *Ravenswood* concluded there

was "no occasion in this case to decide if and under what circumstances beneficiaries' citizenship may affect a trust's citizenship for the purposes of the diversity analysis." *Id.*

*Sola Salon,* an unpublished case with no binding precedential force, 10th Cir. R. App. P. 32.1(a), involved a suit by a trustee in her own name. 500 F. App'x at 725, 727 n.2. That being the case, the rule set out in *Navarro* clearly controls and the decision is of absolutely no relevance to the question whether, when a trust itself is a party to litigation, the trust's citizenship can be determined by considering less than all the trust's members. *Lenon*, also involves a situation in which "the trustees brought suit in their own name in their capacities as trustees of an express trust." 136 F.3d at 1370. Furthermore, the party challenging diversity jurisdiction did "not challenge the trustees' capacity to bring [the] action." *Id.* at 1370 n.2. It is worth noting, however, that *Lenon* recognized the result might well be different if the relevant trusts were parties to the action. *Id.* at 1371 & n.4 (noting the decision in *Carden* might well dictate a different result were the ERISA plans at issue in the case themselves parties to the lawsuit).

Based on the authorities set out above, this court distills the following rule. When a trustee is a party to litigation, it is the trustee's citizenship that controls for purposes of diversity jurisdiction, as long as the trustee satisfies the real-party-in-interest test set out in *Navarro.* When the trust itself is party to the litigation, the citizenship of the trust is derived from

all the trust's "members."[3] That rule does not, standing alone, fully resolve this case because it is necessary to determine which individuals constitute a trust's "membership." The two courts that have considered this question have both determined that, at a minimum, a trust's membership includes the trust's beneficiaries. *Emerald Investors Trust,* 492 F.3d at 205 (concluding both trustees' and beneficiaries' citizenship must be included in determining a trust's citizenship); *Riley,* 292 F.3d at 1338-40 (holding a trust's citizenship is determined solely by reference to the citizenship of the trust's beneficiaries). For those reasons cogently set out by the court in *Emerald Investors Trust,* we conclude any potential definition of the term "members" that is limited to trustees would be inconsistent with the Supreme Court's decision in *Carden*:

> [A] trustee-only rule in an action by the trust itself seems to contradict *Carden* because

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[3] This court need not address the Americold entities' argument that the rule set out in *Carden* is less than fair. As the *Carden* Court noted, the distinctions established in Supreme Court case law between (1) corporations and other artificial entities and (2) the citizenship of an artificial entity and the citizenship of that entity's trustee/limited partner when properly bringing suit in his individual capacity "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organizations." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990). As the Court has made clear, however, any effort to alter the rules clearly laid out in *Carden* must be directed to Congress, rather than to the courts. *Id.* at 196-97.

> that case held that an "artificial entity," a term that we will treat as including a trust, should assume the citizenship of all of its "members." [494 U.S. at 195] The trustee-only rule may contravene *Carden* because it disregards the citizenship of the trust's beneficiary who may be in a position similar to that of the limited partners in a limited partnership.

492 F.3d at 202. Given the unique facts of this case, it is unnecessary to go any further and determine whether a trust's membership also includes its trustees. When Americold Realty Trust's beneficiaries are considered, the record does not establish that either of the Americold entities was completely diverse from ConAgra or Swift-Eckrich at the time of the filing of the complaint in Kansas state court. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004); 28 U.S.C. §§ 1332(a), 1441(a) Thus, this court leaves for another day, when the issue is properly briefed and its disposition will have an impact on the outcome of the case, the question whether a trust's membership includes, in addition to its beneficiaries, its trustees.

## IV. CONCLUSION

The Americold entities have failed to carry their burden of demonstrating the existence of diversity jurisdiction. *Full Life Hospice, LLC v. Sebelius,* 709 F.3d 1012, 1016 (10th Cir. 2013) ("[B]ecause the jurisdiction of federal courts is limited, there is a

presumption against [federal] jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." (quotation omitted)).[4] In response to this court's request for supplemental briefing, the Americold entities declined to offer any evidence as to the citizenship of the beneficiaries of Americold Realty Trust, instead choosing to rely exclusively on their assertion that the trust's citizenship was derived solely from the citizenship of its trustees. Thus, the record fails to establish Americold Realty Trust is not a citizen of Delaware, Nebraska, or Illinois, the states of which ConAgra and Swift-Eckrich are citizens. *See* 28 U.S.C.A. § 1332(c)(1). This same evidentiary deficiency impacts the citizenship of Americold Logistics, LLC. As the Americold entities recognize, the citizenship of Americold Logistics, LLC is determined by reference to its sole owner, Americold Realty Trust. *See supra* n.2. Furthermore, because the parties were given a full opportunity by this court to demonstrate the citizenship of Americold Realty Trust by reference to its beneficiaries, there is no need for further proceedings on remand. Accordingly, this court **REMANDS** this case to the district court to vacate its judgment on the merits and remand the matter to state court.

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[4] At oral argument, ConAgra Foods and Swift-Eckrich conceded federal jurisdiction was lacking should this court determine it must consider the citizenship of Americold Realty Trust's beneficiaries in determining the citizenship of Americold Realty Trust.

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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CONAGRA FOODS, INC., f/k/a Conagra, Inc.; SWIFT-ECKRICH, INC.,

Plaintiffs-Appellants,

and

KRAFT FOODSERVICE, INC.; SAFEWAY, INC.; PHILLIPS CONNECTIONS, INC., d/b/a Phillips Connections and Hanover, Inc.,

Plaintiffs,

v.

AMERICOLD LOGISTICS, LLC; AMERICOLD REALTY TRUST,

Defendants-Appellees.

No. 13-3277
(D.C. No. 2:13-CV-02064-JWL-KGS)
(D. Kan.)

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**ORDER**

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(Filed Apr. 9, 2015)

Before **LUCERO, MURPHY,** and **McHUGH,** Circuit Judges.

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This matter is before the court, *sua sponte,* to amend the Opinion issued originally on January 27, 2015. The amendment is limited to a single sentence in the conclusion of the decision at page 15. A copy of the new Opinion is attached to this Order, and the clerk of court is directed to file the amended decision *nunc pro tunc* to the original filing date.

As directed in our order dated March 23, 2015, issuance of the mandate is stayed until June 22, 2015, and if a petition for writ of certiorari is filed, will continue to be stayed until the Supreme Court's final disposition.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

**UNITED STATES COURT OF APPEAL**

**FOR THE TENTH CIRCUIT**

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|---|---|
| CONAGRA FOODS, INC., f/k/a Conagra, Inc., et al.,<br>Plaintiffs-Appellants,<br>and<br>KRAFT FOODSERVICE, INC., et al.,<br>Plaintiffs,<br>v.<br>AMERICOLD LOGISTICS, LLC, et al.,<br>Defendants-Appellees. | No. 13-3277<br>(D.C. No. 2:13-CV-02064-JWL-KGS)<br>(D. Kan.) |

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**ORDER**

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(Filed Mar. 23, 2015)

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Before **LUCERO, MURPHY,** and **McHUGH,** Circuit Judges.

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This matter is before the court on appellees' motion to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court.

We also have the response filed by the appellants. Upon consideration, the motion is granted.

Issuance of the mandate is stayed until June 22, 2015. If a notice from the Supreme Court clerk is filed with this court during the stay period indicating the appellees have filed a petition for certiorari, the stay will continue until the Supreme Court's final disposition.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

**UNITED STATES COURT OF APPEAL**
**FOR THE TENTH CIRCUIT**

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|---|---|
| CONAGRA FOODS, INC., f/k/a Conagra, Inc., et al.,<br>Plaintiffs-Appellants,<br>and<br>KRAFT FOODSERVICE, INC., et al.,<br>Plaintiffs,<br>v.<br>AMERICOLD LOGISTICS, LLC, et al.,<br>Defendants-Appellees. | No. 13-3277 |

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**ORDER**

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(Filed Oct. 7, 2014)

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This matter is before the Court *sua sponte* at the direction of the panel of judges who will hear and decide the merits of this appeal. The Appellee is directed, within 10 days of the date of this order, to file supplemental briefing addressing the following questions:

1. Was the Defendants' Notice of Removal sufficient to establish diversity jurisdiction in

that the Notice did not establish the citizenship of the beneficial shareholders or beneficiaries of the Americold Realty Trust?

2. If the Notice of Removal did not establish diversity jurisdiction, what curative facts, if any, may the appellee aver to correct this defect in this appeal?

The supplemental brief shall be no longer than 20 pages in a 13-point font, and should be filed via the court's ECF system. No hard copies need be filed.

The Appellant may file a response brief not exceeding 20 pages within 7 days of service of the supplemental brief.

Entered for the Court

ELISABETH A. SHUMAKER,
Clerk

/s/ Chris Wolpert
by: Chris Wolpert
Chief Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF KANSAS**

**Conagra Foods, Inc.**
**f/k/a Conagra, Inc.;**
**Swift-Eckrich, Inc.;**
**Kraft Foodservice, Inc.;**
**Safeway, Inc.; and**
**Phillips Connections, Inc.**
**d/b/a Phillips Connections**
**and Hanover, Inc.,**

**Case No. 13-2064-JWL**

**Plaintiffs,**

**v.**

**Americold Logistics, LLC;**
**and Americold Realty**
**Trust,**

**Defendants.**

## MEMORANDUM & ORDER

(Filed Oct. 4, 2013)

Plaintiffs filed a petition in state court asserting claims for breach of contract and specific performance arising out of defendants' refusal to execute Stipulations of Revivor after the Kansas Supreme Court ruled that plaintiffs' underlying judgments against defendants' predecessor were extinguished. Defendants removed the case on the basis of diversity jurisdiction. Shortly thereafter, defendants filed a motion to dismiss plaintiffs' petition on various grounds. In May 2013, the court held a hearing on the motion to dismiss during which defendants agreed to

withdraw their motion and the parties agreed that the issues were best resolved in the context of cross-motions for summary judgment. The parties further agreed that no discovery was necessary (and none was conducted) and have stipulated to all but a handful of the pertinent facts. This matter, then, is now before the court on the parties' cross-motions for summary judgment (doc. 35 and 37). As will be explained, plaintiffs' motion is denied and defendants' motion is granted.

**Standard**

"Summary judgment is appropriate if the pleadings, depositions, other discovery materials, and affidavits demonstrate the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Water Pik, Inc. v. Med-Systems, Inc.*, ___ F.3d ___, 2013 WL 4046470, at *4 (10th Cir. Aug. 12, 2013) (quotation omitted); *see* Fed. R. Civ. P. 56(a). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Water Pik, Inc.*, ___ F.3d at ___; 2013 WL 4046470, at *4 (quotation omitted). The nonmoving party is entitled to all reasonable inferences from the record; but if the nonmovant bears the burden of persuasion on a claim at trial, summary judgment may be warranted if the movant points out a lack of evidence to support an essential element of that claim and the nonmovant cannot identify specific facts that would create a genuine issue. *Id.*

The fact that the parties here have filed cross-motions for summary judgment does not change the legal standard. Each party has the burden of establishing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law. *Atlantic Richfield Co. v. Farm Cr. Bank,* 226 F.3d 1138, 1148 (10th Cir. 2000). "[C]ross-motions for summary judgment are to be treated separated [sic]; the denial of one does not require the grant of another." *Ultra Clean Holdings, Inc. v. TFG-California, L.P.,* ___ Fed. Appx. ___, at *3 (10th Cir. Aug. 21, 2013) (quoting *Buell Cabinet Co. v. Sudduth,* 608 F.2d 431, 433 (10th Cir. 1979)). "And when the parties file cross-motions for summary judgment, the court is entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts." *Id.* (quoting *Atlantic Richfield,* 226 F.3d at 1148).

**Facts**

The following facts have either been stipulated by the parties in the parties' joint stipulation of facts (doc. 30) or are related in the light most favorable to the nonmoving party. In December 1991 a fire started in an underground storage facility generally known as 6500 Inland Drive in Kansas City, Kansas. The facility was owned and operated by Americold Corporation. Defendant Americold Logistics, LLC, a wholly owned subsidiary of defendant Americold Realty Trust, is the legal successor to Americold Corporation.

Defendants Americold Logistics, LLC and Americold Realty Trust will be referred to collectively as "Americold."

Plaintiffs ConAgra Foods, Inc. f/k/a/ ConAgra, Inc.; Swift-Eckrich, Inc.; Kraft Foodservice, Inc.; Safeway, Inc.; and Phillips Confections, Inc. d/b/a Phillips Confections and Hanover, Inc. leased space for storage of food products in Americold's underground facility. Plaintiffs filed lawsuits against Americold Corporation in 1992 seeking damages for their lost and contaminated products. Plaintiffs' cases were consolidated into *Associated Wholesale Grocers et al. v. Americold Corporation et al.*, Case No. 92C4015 in the District Court of Wyandotte County, Kansas (the "Kansas Action"). Americold Corporation was insured under a policy of commercial excess liability insurance issued by Northwestern Pacific Indemnity Company (NPIC) with limits of $25,000,000. NPIC denied coverage for the claims under the policy's pollution exclusion because NPIC claimed the damages had been caused by toxic smoke. On March 10, 1994, a settlement was reached between Americold Corporation and plaintiffs, along with other claimants against Americold Corporation that are not parties to the present action.

The Settlement Agreement provided for the entry of consent judgments in favor of the plaintiffs and a covenant not to execute by plaintiffs on the personal assets of Americold Corporation. The Settlement Agreement included an assignment by Americold Corporation to plaintiffs of Americold Corporation's

right to seek recovery of insurance policy proceeds and amounts in excess of policy limits from excess carriers including NPIC. As partial consideration for Americold Corporation agreeing to settle the dispute "and in recognition of Americold's interest in protecting its personal assets," plaintiffs agreed that they would seek to satisfy their judgments against Americold Corporation "by execution, garnishment or otherwise as provided by law against the liability insurance identified" in the Settlement Agreement. Settlement Agreement at ¶ 11.3. Americold Corporation agreed to "execute any additional documents necessary to effectuate the purpose and intent of [the Settlement Agreement] or to pursue the assigned claims or execute on the judgments obtained by plaintiffs." *Id.* ¶ 14.1. Pursuant to the Settlement Agreement, consent judgments were entered in favor of plaintiffs and against Americold Corporation. NPIC is not a party to the Consent Judgments.

On March 15, 1994, NPIC filed a declaratory judgment action in the District Court of Johnson County, Kansas against Americold Corporation and plaintiffs in the Kansas Action. The action sought a declaration that (1) the NPIC policy issued to Americold Corporation provided no coverage; (2) NPIC had no duty to defend or indemnify Americold Corporation for the pending lease claims; and (3) if any coverage existed, it was excess to any covered [sic] available to Americold Corporation under the tenant liability policies. This action was transferred to the District Court of Wyandotte County and consolidated

into the Kansas Action. In September 1994, after the Consent Judgments were entered in favor of plaintiffs in the Kansas Action, plaintiffs in the Kansas Action commenced garnishment proceedings against NPIC and TIG Insurance Company.

After extensive discovery in the garnishment action, a ten-week trial took place which terminated on November 15, 2005. Plaintiffs did not file renewal affidavits, file requests for the issuance of additional garnishments, or file motions to revive the Consent Judgments with the District Court of Wyandotte County, Kansas. On November 14, 2005, NPIC filed a Request to the Clerk of Court pursuant to K.S.A. § 60-2403(a) to Release Judgments of Record. The Wyandotte County Clerk released the 1994 Consent Judgments in November 2005. NPIC then moved to dismiss the garnishment proceedings on the grounds that the district court lacked subject matter jurisdiction to conduct the garnishment proceedings. On January 19, 2006, the district court entered its journal entry denying NPIC's motion to dismiss. In that order, the district court determined that "the action of the Clerk of the District Court of Wyandotte County, Kansas in extinguishing these judgments pursuant to K.S.A. 60-2403 was in error based upon the court's ruling herein and is set aside and determined to be void ab initio." On or about August 27, 2007, separate journal entries of judgment were entered against NPIC and in favor of plaintiffs (the "NPIC Judgments").

NPIC appealed the district court's January 19, 2006 decision and the Kansas Supreme Court reversed that decision. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 270 P.3d 1074 (Kan. 2011) (*Americold III*). In so deciding, the Kansas Supreme Court wrote:

> [W]e hold that when the district court entered its judgment against NPIC in this garnishment proceeding, the Plaintiffs' underlying consent judgments against Americold had been extinguished by operation of the dormancy and revivor statutes, K.S.A. 60-2403 and K.S.A. 60-2404. Because Americold was not legally obligated to pay an unenforceable judgment, NPIC was no longer indebted to Americold under its contract to pay the judgments for which Americold was legally liable.

*Id.* at 1083. The Kansas Supreme Court, then, remanded the matter to the district court to dismiss without prejudice the garnishment proceedings. Thereafter, the district court dismissed the garnishment action and vacated the judgments in favor of plaintiffs and against NPIC.[1]

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[1] Plaintiffs assert in their factual statement that NPIC, a non-party to the Consent Judgments, lacked standing to request that the Consent Judgments be released of record. The court, however, does not read plaintiffs' submissions as raising that particular argument here and, in fact, plaintiffs could not assert that argument here.

After the decision in *Americold III*, plaintiffs made demand on Americold to execute Stipulations of Revivor pursuant to K.S.A. § 60-2404, asserting that Americold was contractually obligated to execute those Stipulations under ¶ 14.1 of the parties' Settlement Agreement in the Kansas Action. Americold refused the demand and this lawsuit followed.

Additional facts will be provided as they relate to the specific arguments asserted by the parties in their submissions.

## Discussion

Plaintiffs and Americold move for summary judgment on plaintiffs' specific performance and breach of contract claims.[2] Those claims are based on

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[2] In addition to their breach of contract and specific performance claims, plaintiffs assert in their petition separate claims for breach of the duty of good faith and fair dealing; promissory estoppel; and equitable estoppel. Americold has moved for summary judgment on these claims. Plaintiffs have not mentioned these claims either in their own motion for summary judgment or in response to Americold's motion. The court presumes, then, that plaintiffs have abandoned these claims and grants summary judgment in favor of Americold. *Maestas v. Segura*, 416 F.3d 1182, 1190 n.9 (10th Cir. 2005) (plaintiffs abandoned claims "as evidenced by their failure to seriously address them in their briefs"); *Hinsdale v. City of Liberal, Kansas*, 19 Fed. Appx. 749, 768-70 (10th Cir. 2001) (affirming district court's grant of summary judgment in favor of defendant on certain claims after concluding that plaintiff had abandoned those claims by failing to address them in response to the

(Continued on following page)

Americold's alleged breach of paragraph 14.1 of the parties' Settlement Agreement in the Kansas Action. That paragraph provides:

> Americold agrees that it will make available to Plaintiffs all evidence, not privileged, that relates to Plaintiffs' pursuit of claims assigned in Sections 8 and 9 of this Agreement and will cooperate with Plaintiffs. Americold will execute any additional documents necessary to effectuate the purpose and intent of this Agreement or to pursue the assigned claims or execute on the judgments obtained by Plaintiffs.

On its face, then, paragraph 14.1 contemplates the use of an objective standard in determining whether a particular document is "necessary" to achieve plaintiffs' purposes; plaintiffs may not simply demand the execution of any additional document that they subjectively believe is necessary. Similarly, Americold cannot refuse to sign a document that it subjectively believes is unnecessary to achieve plaintiffs' purposes. None of the parties here contends otherwise.

According to plaintiffs, Americold breached paragraph 14.1 of the parties' agreement by refusing to execute Stipulations of Revivor that would enable plaintiffs to execute on the Consent Judgments. Plaintiffs contend that Americold's refusal has

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defendant's motion for summary judgment) (citing *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992)).

prevented plaintiffs from recovering from NPIC the amount of the judgments against Americold such that plaintiffs have sustained more than $35 million in damages. Americold, in turn, contends that plaintiffs' claims fail because a Stipulation of Revivor is meaningless in light of the Kansas Supreme Court's ruling in *Americold III* that the Consent Judgments have been extinguished and, accordingly, cannot be revived in any event.

In their motions for summary judgment, then, the parties recognize that plaintiffs' claims rise or fall depending on whether the Consent Judgments can be revived by stipulation at this juncture. Plaintiffs urge that K.S.A. § 60-2404 permits the revival of a judgment by stipulation at any time after dormancy. Americold contends that a judgment, once extinguished, simply cannot be revived, even by stipulation. As will be explained, the court concludes that plaintiffs cannot establish that Americold breached any obligations under ¶ 14.1 because, as a matter of law, a Stipulation of Revivor is not "necessary" to plaintiffs' ability to execute upon the Consent Judgments against NPIC. Indeed, because the Kansas Supreme Court in *Americold III* held that the Consent Judgments were "extinguished," a Stipulation of Revivor is but a nullity – utterly useless to plaintiffs' efforts to effectuate the purpose and intent of the parties' settlement agreement in the Kansas Action, to pursue the assigned claims or to execute on the judgments. *See Clark v. Glazer,* 4 Kan. App. 2d 658, 661 (1980) ("By virtue of the statute, after seven

years of inaction by plaintiff her judgment was extinguished, and . . . this declaratory judgment action cannot be used to revive a judgment long dead."). Summary judgment, then, is warranted in favor of Americold and against plaintiffs on their claims.[3]

The court begins its analysis by reviewing the relevant provisions of the dormancy and revivor statutes. Pursuant to K.S.A. § 60-2403, a judgment becomes dormant after five years if a renewal affidavit is not filed or if an execution, including any garnishment proceeding, is not issued. Significantly, § 60-2403 also states that "When a judgment becomes and remains dormant for a period of two years, it shall be the duty of the clerk of the court to release the judgment of record when requested to do so." Deleting the portions applicable to child support judgments, the revivor provisions of K.S.A. § 60-2404 are as follows:

> A dormant judgment may be revived and have the same force and effect as if it had not become dormant if the holder thereof files a motion for revivor and files a request for the immediate issuance of an execution thereon

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[3] The court declines to address Americold's alternative arguments in support of its motion for summary judgment, including its arguments concerning the doctrines of impossibility and frustration of purpose; that plaintiff's claims are barred by the statute of limitations and/or the doctrine of res judicata; that any damages sustained by plaintiffs were caused by plaintiffs' own inaction; and that Americold has fulfilled its contractual obligations.

> if such motion is granted. Notice of the filing of the motion shall be given as for a summons under article 3 of this chapter. If the motion for revivor was filed within two years after the date on which the judgment became dormant . . . , on the hearing thereof the court shall enter an order of revivor unless good cause to the contrary be shown, and thereupon the execution shall issue forthwith. . . . A judgment may also be revived by the filing of a written stipulation of revivor signed by all of the parties affected thereby. For the purpose of this section, . . . any attachment or garnishment process shall have the same effect as the issuance of an execution."

K.S.A. § 60-2404. When viewed together, the dormancy and revivor statutes permit a party to revive a dormant judgment at any time within two years of the date on which such judgment became dormant. *Johnson Bros. Wholesale Liquor Co. v. Clemmons,* 233 Kan. 405, 407 (1983). After that revivor period, a judgment is released pursuant to § 60-2403 and cannot be revived. *See O'connor v. Midwest Pipe Fabricators, Inc.,* 198 F. Supp. 2d 1275, 1278 (D. Kan. 2002) ("When a judgment remains dormant for two years, the judgment is released and may not be revived."); *Long v. Brooks,* 6 Kan. App. 2d 963, 966 (1981) (If a dormant judgment is not revived, it becomes "absolutely extinguished and unenforceable two years thereafter . . . and once the period for revivor passes, there is absolutely nothing left of that

judgment to which even 'equitable principles' could be applied.").

In *Ameriold III,* the Kansas Supreme Court applied the dormancy and revivor statutes to the Consent Judgments at issue here. 270 P.3d 1074 (2011). In that case, NPIC argued that the underlying judgments had become "extinguished" pursuant to K.S.A. § 60-2403 and the Kansas Supreme Court found in favor of NPIC on that issue. *Id.* at 1076, 1083. According to the Court, the consent judgments, under K.S.A. § 60-2403, became dormant in January 2000, five years after the last garnishment was issued. *See Americold III,* 270 P.3d at 1080. The Supreme Court, however, also held that the dormant judgments were "extinguished" because they had not been revived by plaintiffs within two years of dormancy. *See id.* at 1080, 1083. In so holding, the Court reiterated that the dormancy and revivor statutes are distinguished from ordinary statutes of limitation and that they demand "strict compliance and allow for no exceptions." *Id.* at 1082. Because the Consent Judgments were extinguished and unenforceable, the Court held that the district court lacked subject matter jurisdiction to enter a judgment in favor of plaintiffs against NPIC as garnishees and even recognized that the parties could not confer subject matter jurisdiction "by consent." *Id.* at 1079, 1083.

Nonetheless, plaintiffs argue that the filing of a stipulation of revivor is a separate and distinct method of reviving a judgment within K.S.A. § 60-2404 that on its face permits revivor at any time after

dormancy. Plaintiffs note that the provision for the filing of stipulation of revivor is set apart from the provision requiring a motion for revivor within two years after dormancy. Plaintiffs' interpretation of the pertinent statutes is not persuasive to the court. To begin, K.S.A. § 60-2404 plainly applies, as its title dictates, to the "Revivor of [a] Dormant Judgment." By definition, a "dormant" judgment is one that has not been extinguished by lapse of time. Black's Law Dictionary 339 (Abridged 6th ed. 1990). Dormancy can be cured through revival. *Id.*; *First National Bank of Norton v. Harper,* 169 P.2d 844, 845-46 (1946). But a dormant judgment that is not revived within the statutory period "dies." *First National Bank,* 169 P.2d at 846. Pursuant to *Americold III,* the Consent Judgments here are not dormant such that they can be revived under K.S.A. § 60-2404. The Consent Judgments have been "extinguished," 270 P.3d at 1083, and plaintiffs' argument fails to come to grips both with the *Americold III* decision itself (in which the Court recognized that because the judgments were unenforceable, the court lacked subject matter jurisdiction could not be conferred "by consent") and with the critical distinction between dormant and extinguished judgments. Because the Consent Judgments have been extinguished and released of record, they are not subject to revivor under any method set forth in K.S.A. § 60-2404. *See Americold III,* 270 P.3d at 1079 (recognizing that if the judgments are unenforceable, then the parties "cannot confer subject matter jurisdiction on the district court by consent, waiver, or estoppel"); *Long*

*v. Brooks,* 6 Kan. App. 2d 963, 966 (1981) (If a dormant judgment is not revived, it becomes "absolutely extinguished and unenforceable two years thereafter . . . and once the period for revivor passes, there is absolutely nothing left of that judgment to which even 'equitable principles' could be applied."); *Clark v. Glazer,* 4 609 P.2d 1177, 1178-80 (Kan App. 1980) (By virtue of K.S.A. 60-2403 and 60-2404, plaintiff's judgment became "dormant," and then "barred" two years later; a declaratory judgment action could not be used to revive the judgment indirectly "when it could not be revived directly;" the judgment was "long dead").

Moreover, plaintiffs' interpretation of K.S.A. § 60-2404 fails to consider that statute in conjunction with K.S.A. § 60-2403 and the two statutes must necessarily be read together. *Americold III,* 270 P.3d at 1079-80. K.S.A. § 60-2403 plainly provides for a finite dormancy period of two years regardless of the method of revivor utilized: "When a judgment becomes and remains dormant for a period of two years, it shall be the duty of the judge to release the judgment of record when requested to do so." Modern cases support the conclusion that revival of a judgment must occur, if at all, within the two-year period for revivor. *See Cyr v. Cyr,* 815 P.2d 97, 100 (Kan. 1991) ("Once a judgment grows dormant, however, and is not revived pursuant to K.S.A. 60-2404, it becomes absolutely extinguished and unenforceable."); *State v. Douglas,* 279 P.3d at 740-41 (If a dormant judgment is not revived "as provided in K.S.A. 60-2404, such dormant

judgments become absolutely extinguished and unenforceable two years thereafter."); *Gardner v. Gardner,* 916 P.2d 43, 45 (Kan. App. 1996) ("A dormant judgment cannot be revived if it remains dormant for a specified period of time."); *Clark v. Glazer,* 4 609 P.2d 1177, 1178-80 (Kan App. 1980) (By virtue of K.S.A. § 60-2403 and § 60-2404, plaintiff's judgment became "dormant," and then "barred" two years later; a declaratory judgment action could not be used to revive the judgment indirectly "when it could not be revived directly;" the judgment was "long dead").[4]

Plaintiffs urge that their interpretation of the Stipulation of Revivor provision of K.S.A. § 60-2404 is consistent with the legislative history of the statute dating back to the mid- to late 1800s, when Kansas courts, drawing an analogy to the revivor of actions upon a defendant's death, recognized that dormant judgments could be revived by consent despite the fact that the Kansas General Statutes of 1868 did not expressly provide for the revivor of dormant judgments by consent. *See, e.g., Halsey v. Van Vliet,* 27 Kan. 476, 479 (1882). For two reasons, these early cases are not persuasive to the court. First, these

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[4] Plaintiffs have not directed the court to any case permitting an extinguished judgment to be revived under any circumstance. While it is true that there are no cases whatsoever specifically addressing the filing of a "stipulation of revivor under K.S.A. § 60-2404, these cases compel the conclusion that a two-year revivor period exists regardless of the method of revivor.

cases address dormant judgments rather than extinguished judgments. Second, to the extent those cases suggest that a dormant judgment could be revived by consent after the expiration of the prescribed dormancy period, the Kansas Legislature clarified that issue by virtue of a 1909 amendment stating that "If a judgment becomes dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment at any time within two years after it becomes dormant." *See Harvey v. Wasson,* 136 P. 919, 919 (Kan. 1913). By 1945, the General Statutes reflected that a dormant judgment, after two years of dormancy, was "barred" and was required to be released by the clerk of the court. *See* G.S. 1945 § 60-3405. These rules continue to adhere today.

Finally, plaintiffs contend that Americold, under principles of estoppel, cannot now dispute its obligations to plaintiff under the Settlement Agreement because it represented to the district court in the garnishment proceedings that plaintiffs "are entitled to recover from garnishes the amount of all judgments against Americold." Even assuming that plaintiffs came forward with facts establishing the elements of judicial estoppel, *see McClintock v. McCall,* 522 P.2d 343, 346 (Kan. 1974), the Kansas Supreme Court has recognized, in the context of this very case, that once a judgment has been extinguished, there is "nothing left to which equitable principles could be applied." *Americold III,* 270 P.3d at 1082-83 (rejecting plaintiffs' argument that NPIC waived the dormancy defense by failing to appropriately plead it) (citing

*Clark v. Glazer*, 609 P.2d 1177 (Kan. App. 1980)). Indeed, the Court in Americold III expressly emphasized that because the judgments were unenforceable, the district court lacked subject matter jurisdiction to enter a judgment against NPIC and the parties "cannot confer subject matter jurisdiction on the district court by consent, waiver or estoppel." *Id.* at 1079.

For the foregoing reasons, a Stipulation of Revivor cannot revive the Consent Judgments because those Consent Judgments, as held by the Kansas Supreme Court in *Americold III*, have been extinguished and released. Because a Stipulation of Revivor, then, is not "necessary" to plaintiff's efforts to execute on those judgments, Americold has not breached ¶ 14.1 of the parties' Settlement Agreement in the Kansas Action.

**IT IS THEREFORE ORDERED BY THE COURT THAT** defendants' motion for summary judgment (doc. 35) is granted and plaintiffs' motion for summary judgment (doc. 37) is denied.

**IT IS SO ORDERED.**

Dated this 4th day of October, 2013, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

**UNITED STATES COURT OF APPEAL**

**FOR THE TENTH CIRCUIT**

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|---|---|
| CONAGRA FOODS, INC., f/k/a Conagra, Inc., et al.,<br>Plaintiffs-Appellants,<br>and<br>KRAFT FOODSERVICE, INC., et al.,<br>Plaintiffs,<br>v.<br>AMERICOLD LOGISTICS, LLC, et al.,<br>Defendants-Appellees. | No. 13-3277 |

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**ORDER**

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(Filed Feb. 23, 2015)

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Before **LUCERO, MURPHY,** and **McHUGH,** Circuit Judges.

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Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

**NO. 13-3277**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH DISTRICT**

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**CONAGRA FOODS, INC. F/K/A CONAGRA, INC., et al.,**
**Plaintiffs-Appellants,**
**v.**
**AMERICOLD LOGISTICS, LLC, et al.,**
**Defendants-Appellees.**

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**APPEAL FROM THE**
**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**
**The Honorable John W. Lungstrum**
**District Judge**
**District Court Case No.**
**2: 13-cv-02064-JWL/KGS**

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# SUPPLEMENTAL BRIEF OF APPELLEES AMERICOLD LOGISTICS, LLC and AMERICOLD REALTY TRUST

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[1] Appellees Americold Logistics, LLC and Americold Realty Trust respectfully submit this Brief in response to the Court's October 7, 2014, Order.

As explained in greater detail below, federal diversity jurisdiction exists in this case. The parties to this appeal are completely diverse empowering this Court to hear and determine the merits of Appellants' Appeal.

## I. The Notice of Removal is Not Defective

The Court's first question asks: "Was the Defendants' Notice of Removal sufficient to establish diversity jurisdiction in that the Notice did not establish the citizenship of the beneficial shareholders or beneficiaries of the Americold Realty Trust?

* * *

The Notice of Removal was not deficient. The Notice did not identify the citizenship of the beneficial owners or shareholders of the Americold Realty

Trust for the simple reason that United States Supreme Court authority makes clear it is the citizenship of a Trust's trustees that determines the issue of diversity. Admittedly, the Notice does not identify the citizenship of the trustees. However, as noted in response to the Court's second question, that can – and is herein – easily cured.

In *Navarro Savings Association v. Lee,* 446 U.S. 458 (1980), the United States Supreme Court concluded the citizenship of a real estate investment trust is [2] determined solely by the citizenship of its trustees. The Court rejected the argument that the citizenship of the Trust was determined by the location of the "9,500 beneficial shareholders." *Id.* at 464. Instead, the Court looked at the trustees of the trust because they had complete authority over the actions and business of the trust:

> In short, [the Trustees] are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right, without regard to the citizenship of the trust beneficiaries. We find no reason to forsake that principle today.

*Id.* at 465-464 [sic]. The Court therefore looked at the citizenship of the trustees as opposed to the beneficiaries of the trust. In doing to, the Court held "[t]he residence of those who may have an equitable interest is simply irrelevant" for purposes of determining whether diversity exists. *Id.* at 463 (quoting *Bonnafee v. Williams,* 44 U.S. (3. How.) 574, 577 (1845)); *see also*

*Id.* at 464 (citizenship of trust beneficiaries is "immaterial" to jurisdictional analysis) (quoting *Bullard v. Cisco,* 260 U.S. 179, 190 (1933)).

*Navarro* is hardly a novel model for determining citizenship of a trust. The locale of trust beneficiaries has long been deemed irrelevant by the Supreme Court. *Id.* at 462-463 (citing *Chappedelaine v. Dechenaux,* 4 Cranch 306, 308, 2 L.Ed. 629 (1808); *Coal Co. v. Blatchford,* 11 Wall. 172, 177, 20 L.Ed. 179 (1879); [3] *Bonnafee v. Williams,* 3 How. 574, 577, 11 L.Ed. 732 (1845)). The Tenth Circuit has, on at least three occasions, indicated that under *Navarro,* where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity. *See, e.g. Ravenswood Investment Co., L.P. v. Avalon Correctional Services,* 651 F.3d 1219, 122 n. 1 (10th Cir. 2011); *Sola Salon Studios, Inc. v. Heller,* 500 Fed.Appx. 723, 728 n. 2 (10th Cir. 2012) (unpublished); *Lenon v. St. Paul Mercury Ins. Co.,* 136 F.3d 1365, 1371 (10th Cir. 1998) (all citing *Navarro*). Courts in almost all of the other Circuits have concurred. *See, e.g. Mullins v. TestAmerica, Inc.,* 564 F.3d 386 (5th Cir. 2009) (stating that the "citizenship of a trust is that of its trustee"); *Johnson v. Columbia Properties Anchorage, L.P.,* 437 F.3d 894, 899 (9th Cir. 2006) ("A trust has the citizenship of its trustee or trustees."); *May Department Stores Co. v. Federal Ins. Co.,* 350 F.3d 597 (7th Cir. 2002) ("[F]or diversity purposes a trust is a citizen of whatever state the trustee is a citizen of"); *E.R. Squibb & Sons, Inc. v. Accident & Casualty Ins. Co.,* 160 F.3d 925, 931 (2nd Cir. 1998).

The few Circuits that look at the citizenship of trust beneficiaries in determining diversity do so based on a misreading of the Supreme Court's decision in *Carden v. Arkoma Associates,* 494 U.S. 185 (1990). *See, e.g. Emerald Investors Trust v. Gaunt Pasippany Partners,* 492 F.3d 192 (3rd Cir. 2007). *Carden* examined whether the citizenship of limited partners must be considered in [4] analyzing whether diversity jurisdiction exists over a limited partnership. *Id.* at 205-207. The case did not involve a trust of any sort. As one court recently noted, because *Carden* did not concern trusts, "necessarily anything it might have had to say about diversity jurisdiction would be at best *dictum.*" *In re Mortgages Ltd.*, 452 B.R. 776, 779 (D. Ariz. 2011). *See also Watkins v. Trust Under Will of Litt,* No. 3:13-CV-1113, 2014 WL 2981016 at *5 (W.D. Ky., July 1, 2014) ("This Court agrees that the *Carden dictum* remains consistent with the long-held principle that the citizenship of the real party in interest determines the citizenship of the trust, and that for trusts, the real party in interest is the trustee.")

Americold's Trustees are not named parties in this action, but that makes no difference to the application of *Navarro's* clear holding. First, there is nothing in *Navarro* to suggest the case would have turned out differently had the trust, as opposed to the trustee, been named as a party. Indeed, courts all across the country have routinely applied the *Navarro* diversity analysis in cases where the trust – as opposed to the individual trustees – is the named party.

*Goldstick v. ICM Realty,* 788 F.2d 456,458 (7th Cir. 1986) (the trustees were not parties, but that did not matter because "[t]he citizenship of a trust is determined for purposes of diversity jurisdiction by the citizenship of the trustee or, in this case, trustees. . . ."); *Watkins,* 2014 WL 2981016 at *4 (same); *In re Mortgages Ltd.,* 452 B.R. at 781 ("The fact that the trust itself is the named party does not change 150 years of [5] Supreme Court jurisprudence concluding that for real, express trusts, the trustee rather than the beneficiaries is the real party in interest, on whose citizenship the existence of diversity jurisdiction must be found.")

Second, this action was removed to federal court. The two Americold Defendants were chosen by Plaintiffs. They chose to sue Americold Realty Trust as opposed to its Trustees. Application of *Navarro* in this procedural posture is particularly appropriate to preclude even the possibility of forum shopping. In denying a motion to remand a lawsuit brought against a trust – as opposed to the trustees – the court in *Watkins,* provided rationale that applies equally here:

> [R]egardless of who the named plaintiff is, the trustee is the one with the authority to hold, manage and dispose of assets, as well as make decisions on behalf of the trust, and is therefore the real party to the action. As such, when considering whether diversity jurisdiction exists, the citizenship of the trust should be determined by the citizenship of its trustee or trustees only. This rule has the additional benefit of discouraging forum

> shopping by plaintiffs who can decide whether to sue in the name of the trust or trustees.

2014 WL 2981016 at *3 (quoting *Gen. Retirement Sys. Of the City of Detroit v. UBS AG,* 2010 WL 5296957 at *4 (E.D. Mich. Dec. 20, 2010)).

Like the trust at issue in *Navarro* and the other cases discussed above, [6] Americold Realty Trust is also controlled by a Board of Trustees (hereafter "Trustees"). As noted in the attached Declaration of Mr. Todd N. Sheldon, Executive Vice President and Secretary at Americold Realty Trust, the Trustees hold, manage, control and dispose of the Trust Assets for the benefit of the Trust Owners. Sheldon Declaration (Exhibit A) at ¶ 5. Indeed, the Trustees have "full, exclusive and absolute power, control and authority over any and all property of [Americold Realty Trust]." *Id.* at ¶ 7. As such, the citizenship of Americold Realty Trust is determined by the citizenship of its individual Trustees. Mr. Sheldon's Declaration explains at the time this lawsuit was filed, decided below, and up until today, there were seven Trustees who were citizens of New York, Massachusetts, Florida, California, and Pennsylvania. *Id.* at ¶ 8. The Appellants before this Court are not "citizens" of any of these states. Rather, ConAgra is a Delaware corporation with its principle place of business in Nebraska and Swift is a Delaware corporation with its principle place of business in Illinois. See Appendix at A10, ¶¶ 1 and 2. Complete diversity therefore exists.

Given the Supreme Court's determination that the citizenship of a trust's beneficiaries is "immaterial" and irrelevant" in a diversity analysis, the Notice of Removal was not defective by not identify [sic] the citizenship of Americold Realty Trust's beneficiaries.

[7] **II. Complete Diversity Exists and Any Jurisdictional Defects Have Been Cured**

The Court's second question asks: "If the Notice of Removal did not establish diversity jurisdiction, what curative facts, if any, may the appellee aver to correct this defect in this appeal?'

* * *

Any defect in the Notice of Removal has already been cured. As noted above, the only parties in this appeal are completely diverse. There were multiple parties to the same settlement agreement with Americold Realty Trust at issue in this case, with separate judgments in the prior state court litigation. Some decided they had no claim against Americold Realty Trust and did not join in the Complaint in this action. Three of those parties, in addition to Appellants ConAgra and Swift, voluntarily joined in the original Complaint, but acquiesced in the district court judgment and did not appeal and are no longer parties in this proceeding. *Roberts v. Colorado State Board of Agriculture,* 998 F.2d 824, 826 (10th Cir. 1993) (a party that is not named in the notice of

appeal "is not a party to the appeal.") Thus, the judgments against them are final.[1] *See* Federal Rule of Appellate Procedure 4(a)(1)(A); *Piazza v. Aponte Roque,* 909 F.2d 35, 39 (1st Cir. 1990) ("[T]he inescapable consequence of failure to appeal a judgment within the [8] time allowed is that the judgment becomes final.").

The voluntary co-parties were dispensable and are not now parties to this appeal or to any remand. The non-appealing plaintiffs acquiesced in the judgment, and are subject to the same principles for purposes of remand as dismissed, dispensable parties. Their absence does not prejudicially affect any remaining party and solidifies the existence of diversity jurisdiction. *Ravenswood Investment Company, L.P. v. Avalon Correctional Services,* 651 F.3d 1219, 1223 (10th Cir. 2011) (a court can dismiss a dispensable non-diverse party to "cure a jurisdictional defect at any point in the litigation, including after judgment has been entered."; *Casas Office Machs. v. Mita Copystar Am.,* 42 F.3d 668, 678 (1st Cir. 1994) (dismissal of non-diverse parties "restored" complete diversity).

This Court has long held that any "defective allegations of jurisdiction" can be cured in the trial *or* appellate proceedings. *Penteco Corp. v. Union Gas*

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[1] The non-appealing parties also lack the ability to make any jurisdictional challenge. *Travelers' Indemnity Co. v. Bailey,* 557 U.S. 137, 154 (2009); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 377 (1940); *Stoll v. Gottlieb,* 305 U.S. 165, 171-172 (1938).

*System, Inc.*, 929 F.2d 1519,1 [sic] 1523 (10th Cir. 1991). The Americold Appellees respectfully submit that the attached Declaration of Mr. Sheldon showing complete diversity of the parties to this appeal satisfies the necessary jurisdictional facts.

## III. Conclusion

For the foregoing reasons, the Americold Appellees contends [sic] federal diversity jurisdiction exists in this case.

[9] Date: October 17, 2012 [sic]

/s/ Michael D. Pospisil
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John M. Edgar KS FED #70270
Edgar Law Firm LLC
1032 Pennsylvania Ave.
Kansas City, Missouri 64105
Telephone: (816) 531-0033
ATTORNEYS FOR APPELLEES

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## CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Brief of Appellees was filed with the Clerk of the Court using the CM/ECF system with service to the following on this 17th day of October, 2014 to:

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Deron A. Anliker
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f/k/a ConAgra, Inc. and Swift-Eckrich, Inc.

/s/ Michael D. Pospisil
Attorney for Appellees

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**EXHIBIT**
**A**

**DECLARATION OF TODD N. SHELDON**

I, Todd N. Sheldon, declare that the following is true and accurate to the best of my personal knowledge and belief.

1. I am a citizen of the State of Georgia over the age of 18 and make this declaration voluntarily and based upon first-hand knowledge.

2. I am Executive Vice President, General Counsel, and Secretary at Americold Realty Trust ("Americold"), one of the Appellees in this matter.

3. The other Appellee is Americold Logistics, LLC, which is a wholly owned subsidiary of Americold.

4. Americold is a Maryland real estate investment trust formed under Title 8 of the Corporations and Associations Article of the Annotated Code of Maryland.

5. Americold is controlled by a Board of Trustees (hereafter "Trustees"). In particular, the Trustees hold, manage, control and dispose of the Trust Assets for the benefit of the Trust Owners.

6. A copy of Americold's Articles of Amendment and Restatement ("Restatement") is attached as Exhibit 1.

7 Article V of the Restatement sets forth the broad and all-encompassing powers of the Trustees. Specifically, Section 5.1 provides, in pertinent part:

> Subject to any express limitations contained in the Declaration of Trust or in the Bylaws, (a) the business and affairs of the Trust shall be managed under the direction of the Board of Trustees and (b) the Board shall have full, exclusive and absolute power, control and authority over any and all property of the Trust. The Board may take any action as in its sole judgment and discretion is necessary to conduct the business and affairs of the Trust. The Declaration of Trust shall be construed with the presumption in favor of the grant of power and authority to the Board.
>
> Exhibit 1 at § 5.1

8. It is my understanding that this matter was filed on September 24, 2012, and removed to

Federal Court on February 7, 2013. On that date, the Trustees consisted of seven individuals that were domiciled in the following States: New York, Massachusetts, Florida, California, and Pennsylvania.

9. The only original Plaintiffs that appealed the District Court's Order in this case are ConAgra Foods, Inc. f/k/a ConAgra, Inc. ("ConAgra") and Swift-Eckrich, Inc. ("Swift"). The other three original Plaintiffs did not appeal the dismissal of their claims and are thus not parties to this Appeal.

10. ConAgra is a Delaware corporation with its principle place of business in the State of Nebraska. Swift is a Delaware corporation with its principle place of business in the State of Illinois.

11. At the time this case was filed and at the time of removal, none of the Trustees were domiciled in or residents of Delaware, Nebraska, or Illinois. That remains true to this day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 2014.

/s/ Todd N. Sheldon
Todd N. Sheldon
Executive Vice President,
General Counsel And Secretary
of Americold Realty Trust

**EXHIBIT**
**1**

**AMERICOLD REALTY TRUST**

**ARTICLES OF AMENDMENT**
**AND RESTATEMENT**

FIRST: Americold Realty Trust, a Maryland real estate investment trust (the "Trust"), formed under Title 8 of the Corporations and Associations Article of the Annotated Code of Maryland ("Title 8"), desires to amend and restate its Declaration of Trust as currently in effect and as hereinafter amended.

SECOND: The amendment to and restatement of the Declaration of Trust of the Trust as hereinafter set forth have been duly advised by the Board of Trustees and approved by the shareholders of the Trust as required by law.

THIRD: The following provisions are all the provisions of the Declaration of Trust currently in effect and as hereinafter amended:

**ARTICLE I**

**FORMATION**

The Trust is a real estate investment trust within the meaning of Title 8. The Trust shall not be deemed to be a general partnership, limited partnership, joint venture, joint stock company or a corporation but nothing herein shall preclude the Trust from being treated for tax purposes as an association under the

Internal Revenue Code of 1986, as amended (the "Code").

## ARTICLE II

## NAME

The name of the Trust is:

Americold Realty Trust

Under circumstances in which the Board of Trustees of the Trust (the "Board of Trustees" or "Board") determines that the use of the name of the Trust is not practicable, the Trust may use any other designation or name for the Trust.

## ARTICLE III

## PURPOSES AND POWERS

Section 3.1 Purposes. The purposes for which the Trust is formed are to invest in and to acquire, hold, manage, administer, control and dispose of property, including, without limitation or obligation, engaging in business as a real estate investment trust under the Code.

Section 3.2 Powers. The Trust shall have all of the powers granted to real estate investment trusts by Title 8 and all other powers set forth in the Declaration of Trust which are not inconsistent with law and are appropriate to promote and attain the purposes set forth in the Declaration of Trust.

## ARTICLE IV

## RESIDENT AGENT

The name of the resident agent of the Trust in the State of Maryland is The Corporation Trust Incorporated, whose address is 351 West Camden Street, Baltimore, Maryland 21201, The resident agent is a Maryland corporation. The Trust may have such offices or places of business within or outside the State of Maryland as the Board of Trustees may from time to time determine.

## ARTICLE V

## BOARD OF TRUSTEES

Section 5.1 Powers. Subject to any express limitations contained in the Declaration of Trust or in the Bylaws, (a) the business and affairs of the Trust shall be managed under the direction of the Board of Trustees and (b) the Board shall have full, exclusive and absolute power, control and authority over any and all property of the Trust. The Board may take any action as in its sole judgment and discretion is necessary or appropriate to conduct the business and affairs of the Trust. The Declaration of Trust shall be construed with the presumption in favor of the grant of power and authority to the Board. Any construction of the Declaration of Trust or determination made in good faith by the Board concerning its powers and authority hereunder shall be conclusive. The enumeration and definition of particular powers of the Trustees included in the Declaration of Trust or in the

Bylaws shall in no way be construed or deemed by inference or otherwise in any manner to exclude or limit the powers conferred upon the Board or the Trustees under the general laws of the State of Maryland or any other applicable laws.

The Board, without any action by the shareholders of the Trust, shall have and may exercise, on behalf of the Trust, without limitation, the power to terminate the status of the Trust as a real estate investment trust under the Code; to determine that compliance with any restriction or limitations on ownership and transfers of shares of the Trust's beneficial interest set forth in Article VII of the Declaration of Trust is no longer required in order for the Trust to qualify as a real estate investment trust under the Code; to adopt, amend and repeal Bylaws; to elect officers in the manner prescribed in the Bylaws; to solicit proxies from holders of shares of beneficial interest of the Trust; and to do any other acts and deliver any other documents necessary or appropriate to the foregoing powers.

Without limiting Section 10.2 hereof, a Trustee shall perform his or her duties as a Trustee, including his or her duties as a member of a committee of the Board of Trustees, in the same manner as required of a director of a Maryland corporation under Section 2405.1(a) of the Maryland General Corporation Law (the "MGCL"), but with the same rights, limitations and presumptions contained in Section 2-405.1(b)-(g) of the MGCL.

Section 5.2 Number. The number of Trustees (hereinafter the "Trustees") currently is four, which number may be increased or decreased pursuant to the Bylaws of the Trust. The Trustees shall be elected at each annual meeting of shareholders in the manner provided in the Bylaws or, in order to fill any vacancy on the Board of Trustees, in the manner provided in the Bylaws. The names of the Trustees who are currently in office are:

Frederic F. Brace
Jozef Opdeweegh
Stephen R. Sleigh
Ira Tochner

It shall not be necessary to list in the Declaration of Trust the names of any Trustees hereinafter elected.

Section 5.3 Resignation or Removal. Any Trustee may resign in the manner provided in the Bylaws. Subject to the rights of holders of one or more classes or series of Preferred Shares to elect or remove one or more Trustees, a Trustee may be removed at any time, with or without cause, at a meeting of the shareholders, by the affirmative vote of the holders of not less than two-thirds of the Shares then outstanding and entitled to vote generally in the election of Trustees.

Section 5.4 Determinations by Board. The determination as to any of the following matters, made in good faith by or pursuant to the direction of the Board of Trustees consistent with the Declaration of Trust, shall be final and conclusive and shall be

binding upon the Trust and every holder of Shares: the amount of the net income of the Trust for any period and the amount of assets at any time legally available for the payment of dividends, redemption of Shares or the payment of other distributions on Shares; the amount of paid-in surplus, net assets, other surplus, annual or other cash flow, funds from operations, net profit, net assets in excess of capital, undivided profits or excess of profits over losses on sales of assets; the amount, purpose, time of creation, increase or decrease, alteration or cancellation of any reserves or charges and the propriety thereof (whether or not any obligation or liability for which such reserves or charges shall have been created shall have been paid or discharged); any interpretation of the terms, preferences, conversion or other rights, voting powers or rights, restrictions, limitations as to dividends or distributions, qualifications or terms or conditions of redemption of any class or series of Shares; the fair value, or any sale, bid or asked price to be applied in determining the fair value, of any asset owned or held by the Trust or of any Shares; the number of Shares of any class of the Trust; any matter relating to the acquisition, holding and disposition of any assets by the Trust; or any other matter relating to the business and affairs of the Trust or required or permitted by applicable law, the Declaration of Trust or Bylaws or otherwise to be determined by the Board of Trustees.

## ARTICLE VI

## SHARES OF BENEFICIAL INTEREST

Section 6.1 Authorized Shares. The beneficial interest of the Trust shall be divided into shares of beneficial interest (the "Shares"). The Trust has authority to issue 250,000,000 common shares of beneficial interest, 5.01 par value per share ("Common Shares"), and 25,000,000 preferred shares of beneficial interest, $.01 par value per share ("Preferred Shares"). If shares of one class are classified or reclassified into shares of another class of shares pursuant to this Article VI, the number of authorized shares of the former class shall be automatically decreased and the number of shares of the latter class shall be automatically increased, in each case by the number of shares so classified or reclassified, so that the aggregate number of shares of beneficial interest of all classes that the Trust has authority to issue shall not be more than the total number of shares of beneficial interest set forth in the second sentence of this paragraph. Subject to the terms of any class or series of Preferred Shares, the Board of Trustees, with the approval of a majority of the entire Board and without any action by the shareholders of the Trust, may amend the Declaration of Trust from time to time to increase or decrease the aggregate number of Shares or the number of Shares of any class or series that the Trust has authority to issue.

Section 6.2 Common and Preferred Shares.

(a) Common Shares. Subject to the provisions of Article VII, each Common Share shall entitle the holder thereof to one vote on each matter upon which holders of Common Shares are entitled to vote. The Board of Trustees may reclassify any unissued Common Shares from time to time in one or more classes or series of Shares.

(b) Preferred Shares. The Board of Trustees may classify any unissued Preferred Shares and reclassify any previously classified but unissued Preferred Shares of any series from time to time, in one or more series of Shares.

Section 6.3 Series A Preferred Shares.

(a) Designation and Number. 125 Preferred Shares shall initially be designated as "12.5% Series A Cumulative Non-Voting Preferred Shares" (the "Series A Preferred Shares"). The express terms and provisions of all of the Series A Preferred Shares shall be identical in all respects and shall have equal rights and privileges, except as otherwise provided in this Section 6.3.

(b) Rank. The Series A Preferred Shares shall, with respect to dividend and redemption rights and rights upon liquidation, dissolution or winding up of the Trust, rank senior to the Common Shares of the Trust and to all other Shares issued by the Trust from time to time (together with the Common Shares, the "Junior Securities").

(c) Dividends.

(i) Each holder of the then outstanding Series A Preferred Shares shall be entitled to receive, when and as authorized by the Board and declared by the Trust, out of funds legally available for the payment of dividends, cumulative preferential cash dividends per Series A Preferred Share at the rate of 12.5% per annum of the total of $1,000.00 plus all accumulated and unpaid dividends thereon. Such dividends shall accrue on a daily basis and be cumulative from the first date on which any Series A Preferred Share is issued, such issue date to be contemporaneous with the receipt by the Trust of subscription funds for the Series A Preferred Shares (the "Original Issue Date"), and shall be payable semi-annually in arrears on or before June 30 and December 31 of each year or, if not a business day, the next succeeding business day (each, a "Dividend Payment Date"). Any dividend payable on the Series A Preferred Shares for any partial dividend period will be computed on the basis of a 360-day year consisting of twelve 30-day months. A "dividend period" shall mean, with respect to the first "dividend period," the period from and including the Original Issue Date to and including the first Dividend Payment Date, and with respect to each subsequent "dividend period," the period from but excluding a Dividend Payment Date to and including the next succeeding Dividend Payment Date or other date as of which accrued dividends are to be calculated. Dividends will be payable to holders of record as they

appear in the share transfer records of the Trust at the close of business on the applicable record date, which shall be the fifteenth day of the calendar month in which the applicable Dividend Payment Date falls or on such other date designated by the Board for the payment of dividends that is not more than 30 nor less than 10 days prior to such Dividend Payment Date (each, a "Dividend Record Date").

(ii) No dividends on the Series A Preferred Shares shall be declared by the Trust or paid or set apart for payment by the Trust at such time as the terms and provisions of any written agreement between the Trust and any party that is not an affiliate of the Trust, including any agreement relating to its indebtedness, prohibit such declaration, payment or setting apart for payment or provide that such declaration, payment or setting apart for payment would constitute a breach thereof or a default thereunder, or if such declaration or payment shall be restricted or prohibited by law. For purposes of this Section 6.3(c)(ii), "affiliate" shall mean any party that controls, is controlled by or is under common control with the Trust.

(iii) Notwithstanding the foregoing, dividends on the Series A Preferred Shares shall accrue whether or not the terms and provisions set forth in Section 6.3(c)(ii) above at any time prohibit the current payment of dividends, whether or not the Trust has earnings, whether or not there are funds legally available for the payment of such dividends and whether or not such dividends are authorized or

declared. Accrued but unpaid dividends on the Series A Preferred Shares will accumulate as of the Dividend Payment Date on which they first become payable. Furthermore, dividends will be declared and paid when due in all events to the fullest extent permitted by law and except as provided in Section 6.3(c)(ii) above.

(iv) Unless full cumulative dividends on all outstanding Series A Preferred Shares have been or contemporaneously are declared and paid or declared and a sum sufficient for the payment thereof is set apart for payment for all past dividend periods, no dividends (other than in shares of Junior Securities) shall be declared or paid or set apart for payment nor shall any other distribution be declared or made upon any shares of Junior Securities, nor shall any shares of Junior Securities be redeemed, purchased or otherwise acquired for any consideration (or any moneys be paid to or made available for a sinking fund for the redemption of any such Junior Securities) by the Trust (except by conversion into or exchange for other shares of Junior Securities and except for transfers, redemptions or purchases made pursuant to the provisions of Sections 7.2.1(b) and 7.3).

(v) When dividends are not paid in full (or a sum sufficient for such full payment is not set apart) on the Series A Preferred Shares, all dividends declared upon the Series A Preferred Shares shall be declared and paid pro rata based on the number of Series A Preferred Shares then outstanding.

(vi) Any dividend payment made on the Series A Preferred Shares shall first be credited against the earliest accrued but unpaid dividend due with respect to such shares which remains payable. Holders of the Series A Preferred Shares shall not be entitled to any dividend, whether payable in cash, property or shares, in excess of full cumulative dividends on the Series A Preferred Shares as described above.

(d) Liquidation Preference.

(i) Upon any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Trust, the holders of Series A Preferred Shares then outstanding will be entitled to be paid, or have the Trust declare and set apart for payment, out of the assets of the Trust legally available for distribution to its shareholders and after payment or provision for payment of the debts and other liabilities of the Trust, a liquidation preference per Series A Preferred Share equal to the sum of the following (collectively, the "Liquidation Preference"): (A) $1,000.00, (B) all accrued and unpaid dividends thereon through and including the date of payment, and (C) if the Liquidation Event occurs before the Redemption Premium (as defined below) right expires, the per share Redemption Premium in effect on the date of payment of the Liquidation Preference, before any distribution of assets is made to holders of any Junior Securities. In the event that the Trust elects to set apart the Liquidation Preference for payment, the Series A Preferred Shares shall remain outstanding

until the holders thereof are paid the full Liquidation Preference, which payment shall be made no later than immediately prior to the Trust making its final liquidating distribution on the Common Shares. In the event that the Redemption Premium in effect on the payment date is less than the Redemption Premium on the date that the Liquidation Preference was set apart for payment, the Trust may make a corresponding reduction to the funds set apart for payment of the Liquidation Preference.

(ii) In the event that, upon any such voluntary or involuntary liquidation, dissolution or winding up, the available assets of the Trust are insufficient to pay the full amount of the Liquidation Preference on all outstanding Series A Preferred Shares, then the holders of the Series A Preferred Shares shall share ratably in any such distribution of assets in proportion to the full Liquidation Preference to which they would otherwise be respectively entitled.

(iii) After payment of the full amount of the Liquidation Preference to which they are entitled, the holders of Series A Preferred Shares will have no right or claim to any of the remaining assets of the Trust.

(iv) Upon the Trust's provision of written notice as to the effective date of any such liquidation, dissolution or winding up of the Trust, accompanied by a check in the amount of the full Liquidation Preference to which each record holder of

Series A Preferred Shares is entitled, the Series A Preferred Shares shall no longer be deemed outstanding and all rights of the holders of such shares will terminate. Such notice shall be given by first class mail, postage pre-paid, to each record holder of the Series A Preferred Shares at the respective mailing addresses of such holders as the same shall appear on the share transfer records of the Trust.

(e) Consolidation and Merger. The consolidation or merger of the Trust with or into any other business enterprise or of any other business enterprise with or into the Trust, or the sale, lease or conveyance of all or substantially all of the assets or business of the Trust, or a statutory share exchange, shall not be deemed to constitute a liquidation, dissolution or winding up of the Trust.

(f) Redemption.

(i) Right of Optional Redemption. The Trust, at its option, may redeem the Series A Preferred Shares, in whole or in part, at any time or from time to time, for cash at a redemption price per Series A Preferred Share (the "Redemption Price") equal to $1,000.00 plus all accrued and unpaid dividends thereon to and including the date fixed for redemption (except as provided in Section 6(f)(iii) below), plus a redemption premium per share (each, a "Redemption Premium") calculated as follows based on the date fixed for redemption: (A) until December 31, 2010, $200; (B) from January 1, 2011 to December 31, 2011, $150; (C) from January 1, 2012 to December 31,

2012, $100; (D) from January 1, 2013 to December 31, 2013, $50; and (E) thereafter, no Redemption Premium. If less than all of the outstanding Series A Preferred Shares are to be redeemed, the Series A Preferred Shares to be redeemed may be selected by any equitable method determined by the Trust provided that such method does not result in the creation of fractional shares.

(ii) Limitations on Redemption. Unless full cumulative dividends on all Series A Preferred Shares shall have been, or contemporaneously are, declared and paid or declared and a sum sufficient for the payment thereof set apart for payment for all past dividend periods, no Series A Preferred Shares shall be redeemed or otherwise acquired, directly or indirectly, by the Trust unless all outstanding Series A Preferred Shares are simultaneously redeemed or acquired, and the Trust shall not purchase or otherwise acquire, directly or indirectly, any shares of any Junior Securities of the Trust (except by exchange for shares of Junior Securities); *provided, however,* that the foregoing shall not prevent the purchase by the Trust of shares transferred to a Charitable Beneficiary pursuant to Sections 7.2.1(b) and 7.3, in order to ensure that the Trust remains qualified as a real estate investment trust for federal income tax purposes or the purchase or acquisition of Series A Preferred Shares pursuant to a purchase or exchange offer made on the same terms to holders of all outstanding Series A Preferred Shares.

(iii) Rights to Dividends on Shares Called for Redemption. Immediately prior to or upon any redemption of Series A Preferred Shares, the Trust shall pay, in cash, any accumulated and unpaid dividends to and including the redemption date, unless a redemption date falls after a Dividend Record Date and prior to the corresponding Dividend Payment Date, in which case each holder of Series A Preferred Shares at the close of business on such Dividend Record Date shall be entitled to the dividend payable on such shares on the corresponding Dividend Payment Date notwithstanding the redemption of such shares before such Dividend Payment Date.

(iv) Procedures for Redemption.

(A) Upon the Trust's provision of written notice as to the effective date of the redemption, accompanied by a check in the amount of the full Redemption Price through such effective date to which each record holder of Series A Preferred Shares is entitled, the Series A Preferred Shares shall be redeemed and shall no longer be deemed outstanding shares of beneficial interest in the Trust and all rights of the holders of such shares will terminate. Such notice shall be given by first class mail, postage pre-paid, to each record holder of the Series A Preferred Shares at the respective mailing addresses of such holders as the same shall appear on the share transfer records of the Trust, No failure to give such notice or any defect therein or in the mailing thereof shall affect the validity of

the proceedings for the redemption of any Series A Preferred Shares except as to the holder to whom notice was defective or not given.

(B) In addition to any information required by law or by the applicable rules of any exchange upon which Series A Preferred Shares may be listed or admitted to trading, such notice shall state; (1) the redemption date; (2) the Redemption Price; (3) the number of: Series A Preferred Shares to be redeemed; (4) the place or places where the Series A Preferred Shares are to be surrendered (if so required in the notice) for payment of the Redemption Price (if not otherwise included with the notice); and (5) that dividends on the shares to be redeemed will cease to accrue on such redemption date. If less than all of the Series A Preferred Shares held by any holder are to be redeemed, the notice mailed to such holder shall also specify the number of Series A Preferred Shares held by such holder to be redeemed.

(C) If notice of redemption of any Series A Preferred Shares has been given in accordance with this Section 6.3(f)(iv), then, from and after the redemption date, dividends will cease to accrue on such Series A Preferred Shares, such Series A Preferred Shares shall no longer be deemed outstanding and all rights of the holders of such shares will terminate.

(6) Application of Article VII. The Series A Preferred Shares are subject to the provisions of Article VII, including, without limitation, the provisions of Sections 7.2.1(a) and (b) and Section 7.3.

(7) Status of Redeemed Shares. Any Series A Preferred Shares that shall at any time have been redeemed or otherwise acquired by the Trust shall, after such redemption or acquisition, have the status of authorized but unissued Series A Preferred Shares which may be issued by the Board from time to time at its discretion.

(g) Voting Rights. Except as provided in this Section, the holders of the Series A Preferred Shares shall not be entitled to vote on any matter submitted to the shareholders of the Trust for a vote. Notwithstanding the foregoing, the consent of the holders of a majority of the outstanding Series A Preferred Shares, voting as a separate class, shall be required for (i) authorization or issuance of any equity security of the Trust senior to or on a parity with the Series A Preferred Shares, (ii) any reclassification of the Series A Preferred Shares or (iii) any amendment to the Declaration of Trust or the terms of the Series A Preferred Shares, whether by merger, consolidation, transfer or conveyance of all or substantially all of the assets of the Trust or otherwise (an "Event"), which amendment materially and adversely affects any right, preference, privilege or voting power of the Series A Preferred Shares or which increases the number of authorized Series A Preferred Shares to a number greater than 1,000; *provided however* that with respect to the occurrence of any of the Events set forth in subsection (iii) above, so long as the Series A Preferred Shares remain

outstanding with the terms thereof' materially unchanged or the holders of Series A Preferred Shares receive equity securities of the successor or survivor of such Event with substantially identical rights as the Series A Preferred Shares, taking into account that, after the occurrence of an Event, the Trust may not be the surviving entity or the surviving entity may not be a real estate investment trust, the occurrence of such Event shall not be deemed to materially and adversely affect such rights, preferences, privileges or voting powers of the Series A Preferred Shares, and in such case the holders of Series A Preferred Shares shall not have any voting rights with respect to the occurrence of any of the Events set forth in subsection (iii) above unless the number of authorized Series A Preferred Shares is increased to a number greater than 1,000. Notwithstanding any other provision to the contrary, each Series A Preferred Share held by Yucaipa American Alliance Fund I, LP, Yucaipa American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund II, L.P. and Yucaipa American Alliance (Parallel) Fund II, L.P., each a Delaware limited partnership (collectively, "Yucaipa"), shall be entitled to one vote for every 10 Series A Preferred Shares held by Yucaipa on each matter upon which holders of the Series A Preferred Shares are entitled to vote. Every other Series A Preferred Share (i.e., each Series A Preferred Share not held by Yucaipa) shall entitle the holder thereof to one vote on each matter upon which holders of Series A Preferred Shares are entitled to vote.

(h) Conversion. The Series A Preferred Shares are not convertible into or exchangeable for any other property or securities of the Trust.

(i) Notice of Transfer. Holders of Series A Preferred Shares will be required to give the Trust written prior notice of any proposed transfer of a Series A Preferred Share, which notice must specify the name of the proposed transferee.

Section 6.4 Classified or Reclassified Shares. Prior to issuance of classified or reclassified Shares of any class or series, the Board of Trustees by resolution shall (a) designate that class or series to distinguish it from all other classes and series of Shares; (b) specify the number of Shares to be included in the class or series; (c) set, subject to the provisions of Article VII and subject to the express terms of any class or series of Shares outstanding at the time, the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications and terms and conditions of redemption for each class or series; and (d) cause the Trust to file articles supplementary with the State Department of Assessments and Taxation of Maryland (the "SDAT"). Any of the terms of any class or series of Shares set pursuant to clause (c) of this Section 6.4 may be made dependent upon facts ascertainable outside the Declaration of Trust (including the occurrence of any event, Including a determination or action by the Trust or any other person or body) and may vary among holders thereof, provided that the manner in which such facts or variations

shall operate upon the terms of such class or series of Shares is clearly and expressly set forth in the articles supplementary filed with the SDAT.

Section 6.5 Authorization by Board of Share Issuance. The Board of Trustees may authorize the issuance from time to time of Shares of any class or series, whether now or hereafter authorized, or securities or rights convertible into Shares of any class or series, whether now or hereafter authorized, for such consideration (whether in cash, property, past or future services, obligation for future payment or otherwise) as the Board of Trustees may deem advisable (or without consideration in the case of a Share split or Share dividend), subject to such restrictions or limitations, if any, as may be set forth in the Declaration of Trust or the Bylaws of the Trust.

Section 6.6 Dividends and Distributions. The Board of Trustees may from time to time authorize, and cause the Trust to declare to shareholders, such dividends or distributions, in cash or other assets of the Trust or in securities of the Trust or from any other source as the Board of Trustees in its discretion shall determine. The Board of Trustees shall endeavor to cause the Trust to declare and pay such dividends and distributions as shall be necessary for the Trust to qualify as a real estate investment trust under the Code; however, shareholders shall have no right to any dividend or distribution unless and until authorized by the Board and declared by the Trust, The exercise of the powers and rights of the Board of Trustees pursuant to this Section 6.6 shall be subject

to the provisions of any class or series of Shares at the time outstanding. Notwithstanding any other provision in the Declaration of Trust, no determination shall be made by the Board of Trustees nor shall any transaction be entered into by the Trust which would cause any Shares or other beneficial interest in the Trust not to constitute "transferable shares" or "transferable certificates of beneficial interest" under Section 856(a)(2) of the Code or which would cause any distribution to constitute a preferential dividend as described in Section 562(c) of the Code.

Section 6.7 General Nature of Shares. All Shares shall be personal property entitling the shareholders only to those rights provided in the Declaration of Trust. The shareholders shall have no interest in the property of the Trust and shall have no right to compel any partition, division, dividend or distribution of the Trust or of the property of the Trust. The death of a shareholder shall not terminate the Trust. The Trust is entitled to treat as shareholders only those persons in whose names Shares are registered as holders of Shares on the share ledger of the Trust.

Section 6.8 Fractional Shares. The Trust may, without the consent or approval of any shareholder, issue fractional Shares, eliminate a fraction of a Share by rounding off to a full Share, arrange for the disposition of a fraction of a Share by the person entitled to it, or pay cash for the fair value of a fraction of a Share.

Section 6.9 Declaration, Bylaws and Shareholders Agreement. The rights of all shareholders and the terms of all Shares are subject to the provisions of (a) the Declaration of Trust and the Bylaws of the Trust and (b) to the extent applicable to any now or hereafter authorized Shares, the Shareholders Agreement by and among the Trust and the Shareholders of the Trust, effective as of the Initial Date (as defined in Article VII), as the same may be amended from time to time (the "Shareholders Agreement").

Section 6.10 Divisions and Combinations of Shares. Subject to an express provision to the contrary in the terms of any class or series of beneficial interest hereafter authorized, the Board of Trustees shall have the power to divide or combine the outstanding shares of any class or series of beneficial interest, without a vote of shareholders.

## ARTICLE VII

## CERTAIN RESTRICTION ON TRANSFER AND OWNERSHIP OF SHARES

Section 7.1 Definitions. For the purpose of this Article VII, the following terms shall have the following meanings:

Aggregate Share Ownership Limit. The term "Aggregate Share Ownership Limit" shall mean not more than 7.8 percent in value of the aggregate outstanding Equity Shares. The value of the outstanding Equity Shares shall be determined by the

Board of Trustees in good faith, which determination shall be conclusive for all purposes hereof.

Beneficial Ownership. The term "Beneficial Ownership" shall mean ownership of Equity Shares by a Person, whether the interest in Equity Shares is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 544 of the Code, as modified by Section 856(h)(1)(B) and 856(h)(3)(A) of the Code. The terms "Beneficial Owner," "Beneficially Owns" and "Beneficially Owned" shall have the correlative meanings.

Business Day. The term "Business Day" shall mean any day, other than a Saturday or Sunday, that is neither a legal holiday nor a day on which banking institutions in New York City are authorized or required by law, regulation or executive order to close.

Charitable Beneficiary. The term "Charitable Beneficiary" shall mean one or more beneficiaries of the Charitable Trust as determined pursuant to Section 7.3.6, provided that each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A), 2055 and 2522 of the Code.

Charitable Trust. The term "Charitable Trust" shall mean any trust provided for in Section 7.3.1.

Code. The term "Code" shall mean the Internal Revenue Code of 1986, as amended from time to time.

Constructive Ownership. The term "Constructive Ownership" shall mean ownership of Equity Shares by a Person, whether the interest in Equity Shares is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 318(a) of the Code, as modified by Section 856(d)(5) of the Code. The terms "Constructive Owner," "Constructively Owns" and "Constructively Owned" shall have the correlative meanings.

Declaration of Trust. The term "Declaration of Trust" shall mean these Articles of Amendment and Restatement as accepted for record by the SDAT, and any amendments and supplements thereto.

Equity Shares. The term "Equity Shares" shall mean Shares of all classes or series, including, without limitation, Common Shares and Preferred Shares. The term "Equity Shares" shall not include convertible debt securities unless and until such securities are converted into Equity Shares of the Trust.

Excepted Holder. The term "Excepted Holder" shall mean (a) Ronald NW. Burkle; and (b) a shareholder of the Trust for whom an Excepted Holder Limit is created by this Article VII or by the Board of Trustees pursuant to Section 7.2.7.

Excepted Holder Limit. The term "Excepted Holder Limit" shall mean (a) as to Ronald W. Burkle,

18 percent in value of the aggregate of the outstanding Equity Shares and (b) provided that the affected Excepted Holder agrees to comply with the requirements established by the Board of Trustees pursuant to Section 7.2.7, and subject to adjustment pursuant to Section 7.2.8, the percentage limit established by the Board of Trustees pursuant to Section 7.2.7.

Individual. The term "Individual" shall mean (a) an "individual" within the meaning of Section 542(a)(2) of the Code, as modified by Section 544 of the Code, and/or (b) any beneficiary of a "qualified trust" (as defined in Section 856(h)(3)(E) of the Code) which qualified trust is eligible for look-through treatment under Section 856(h)(3)(A) of the Code for purposes of determining whether a REIT is closely held under Section 856(a)(6) of the Code, in which case the qualified trust shall not be treated as an Individual.

Initial Date. The term "Initial Date" shall mean the date of the closing of the transactions contemplated by the Preferred Shares Purchase Agreement by and among the Trust and GS Capital Partners VI Fund, L.P., GS Capital Partners VI Parallel, L.P., GSCP VI Offshore IceCap Investment, L.P., GSCP VI GmbH IceCap Investment, L.P., IceCap2 Holdings, L.P. and, if the CM Condition (as defined therein) is satisfied, Charm Progress Investment Limited.

Market Price. The term "Market Price" on any date shall mean, with respect to any class or series of outstanding Equity Shares, the Closing Price for such Equity Shares on such date. The "Closing Price" on any date shall mean the last sale price for such Equity Shares, regular way, or, in case no such sale takes place on such day, the average of the closing bid and asked prices, regular way, for such Equity Shares, in either case as reported in the principal consolidated transaction reporting system with respect to securities listed or admitted to trading on the NYSE or, if such Equity Shares are not listed or admitted to trading on the NYSE, as reported on the principal consolidated transaction reporting system with respect to securities listed on the principal national securities exchange on which such Equity Shares are listed or admitted to trading or, if such Equity Shares are not listed or admitted to trading on any national securities exchange, the last quoted price, or, if not so quoted, the average of the high bid and low asked prices in the over-the-counter market, as reported by the principal automated quotation system then in use or, if such Equity Shares are not quoted by any such organization, the average of the closing bid and asked prices as furnished by a professional market maker making a market in such Equity Shares selected by the Board of Trustees or, in the event that no trading price is available for such Equity Shares, the fair market value of Equity Shares, as determined in good faith by the Board of Trustees.

NYSE. The term "NYSE" shall mean the New York Stock Exchange.

One Hundred Shareholder Date. The term "One Hundred Shareholder Date" shall mean the first date upon which the Equity Shares are beneficially owned by 100 or more Persons within the meaning of Code Section 856(a)(5) without regard to Code Section 856(h)(2).

Person. The term "Person" shall mean an individual, corporation, partnership, estate, trust (including a trust qualified under Sections 401(a) or 501(c)(17) of the Code), a portion of a trust permanently set aside for or to be used exclusively for the purposes described in Section 642(c) of the Code, association, private foundation within the meaning of Section 509(a) of the Code, joint stock company or other entity and also includes a group as that term is used for purposes of Section 13(d)(3) of the Securities Exchange Act of 1934, as amended, and a group to which an Excepted Holder Limit applies.

Prohibited Owner. The term "Prohibited Owner" shall mean, with respect to any purported Transfer, any Person who, but for the provisions of Section 7.2.1, would Beneficially Own or Constructively Own Equity Shares, and if appropriate in the context, shall also mean any Person who would have been the record owner of Equity Shares that the Prohibited Owner would have so owned.

REIT. The term "REIT" shall mean a real estate investment trust within the meaning of Section 856 of the Code.

Restriction Termination Date. The term "Restriction Termination Date" shall mean the first day after the Initial Date on which the Board of Trustees determines that it is no longer in the best interests of the Trust to attempt to, or continue to, qualify as a REIT or that compliance with the restrictions and limitations on Beneficial Ownership, Constructive Ownership and Transfers of Equity Shares set forth herein is no longer required in order for the Trust to qualify as a REIT.

SDAT. The term "SDAT" shall mean the State Department of Assessments and Taxation of Maryland.

Transfer. The term "Transfer" shall mean any issuance, sale, transfer, gift, assignment, devise or other disposition, as well as any other event that causes any Person to acquire Beneficial Ownership or Constructive Ownership, or any agreement to take any such actions or cause any such events, of Equity Shares or the right to vote or receive dividends on Equity Shares, including (a) the granting or exercise of any option (or any disposition of any option), (b) any disposition of any securities or rights convertible into or exchangeable for Equity Shares or any interest in Equity Shares or any exercise of any such conversion or exchange right and (c) Transfers of interests in other entities that result in changes in

Beneficial or Constructive Ownership of Equity Shares; in each case, whether voluntary or involuntary, whether owned of record, Constructively Owned or Beneficially Owned and whether by operation of law or otherwise. The terms "Transferring" and "Transferred" shall have the correlative meanings.

Trustee. The term "Trustee" shall mean the Person unaffiliated with the Trust and a Prohibited Owner, that is appointed by the Trust to serve as trustee of the Charitable Trust.

Section 7.2 Equity Shares.

Section 7.2.1 Ownership Limitations. During the period commencing on the Initial Date (or the One Hundred Shareholder Date with respect to only subsection (a)(iii) below) and prior to the Restriction Termination Date:

(a) Basic Restrictions.

(i)(1) No Individual, other than an Excepted Holder, shall Beneficially Own Equity Shares in excess of the Aggregate Share Ownership Limit, and (2) no Excepted Holder shall Beneficially Own Equity Shares in excess of the Excepted Holder Limit for such Excepted Holder.

(ii) No Person shall Beneficially or Constructively Own Equity Shares to the extent that such Beneficial or Constructive Ownership of Equity Shares would result in the Trust being "closely held" within the meaning of Section 856(h) of the Code (without regard to whether the ownership interest is

held during the last half of a taxable year), or otherwise failing to qualify as a REIT (including, but not limited to, Beneficial or Constructive Ownership that would result in the Trust owning (actually or Constructively) an interest in a tenant that is described in Section 856(d)(2)(B) of the Code if the income derived by the Trust from such tenant would cause the Trust to fail to satisfy any of the gross income requirements of Section 856(c) of the Code).

(iii) Notwithstanding any other provisions contained herein, any Transfer of Equity Shares (whether or not such Transfer is the result of a transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system) that, if effective, would result in Equity Shares being beneficially owned by less than 100 Persons (determined under the principles of Section 856(a)(5) of the Code) shall be void *ab initio*, and the intended transferee shall acquire no rights in such Equity Shares.

(b) Transfer in Trust. If any Transfer of Equity Shares (whether or not such Transfer is the result of a transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system) occurs which, if effective, would result in any Person Beneficially Owning or Constructively Owning Equity Shares in violation of Section 7.2.1(a)(i) or (ii),

(i) then that number of Equity Shares the Beneficial or Constructive Ownership of which otherwise would cause such Person to violate Section 7.2.1(a)(i) or (ii) (rounded to the nearest whole share) shall be automatically transferred to a Charitable Trust for the benefit of a Charitable Beneficiary, as described in Section 7.3, effective as of the close of business on the Business Day prior to the date of such Transfer, and such Person shall acquire no rights in such Equity Shares; or

(ii) if the transfer to the Charitable Trust described in clause (i) of this sentence would not be effective for any reason to prevent the violation of Section 7.2.1(a)(i) or (ii), then the Transfer of that number of Equity Shares that otherwise would cause any Person to violate Section 7.2.1(a)(i) or (ii) shall be void *ab initio*, and the intended transferee shall acquire no rights in such Equity Shares.

Section 7.2.2 Remedies for Breach. If the Board of Trustees or any duly authorized committee thereof shall at any time determine in good faith that a Transfer or other event has taken place that results in a violation of Section 7.2.1 or that a Person intends to acquire or has attempted to acquire Beneficial or Constructive Ownership of any Equity Shares in violation of Section 7.2.1 (whether or not such violation is intended), the Board of Trustees or a committee thereof shall take such action as it deems advisable to refuse to give effect to or to prevent such Transfer or other event, including, without limitation, causing the Trust to redeem Equity Shares, refusing

to give effect to such Transfer on the books of the Trust or instituting proceedings to enjoin such Transfer or other event; provided, however, that any Transfers or attempted Transfers or other events in violation of Section 7.2.1 shall automatically result in the transfer to the Charitable Trust described above, and, where applicable, such Transfer (or other event) shall be void *ab initio* as provided above irrespective of any action (or non-action) by the Board of Trustees or a committee thereof.

Section 7.2.3 Notice of Restricted Transfer. Any Person who acquires or attempts or intends to acquire Beneficial Ownership or Constructive Ownership of Equity Shares that will or may violate Section 7.2.1(a), or any Person who would have owned Equity Shares that resulted in a transfer to the Charitable Trust pursuant to the provisions of Section 7.2.1(b), shall immediately give written notice to the Trust of such event, or in the case of such a proposed or attempted transaction, give at least 15 days prior written notice, and shall provide to the Trust such other information as the Trust may request in order to determine the effect, if any, of such Transfer on the Trust's status as a REIT.

Section 7.2.4 Owners Recruited To Provide Information. From the Initial Date and prior to the Restriction Termination Date:

(a) every owner of more than five percent (or such lower percentage as required by the Code or the Treasury Regulations promulgated thereunder) of

the outstanding Equity Shares, within 30 days after the end of each taxable year, shall give written notice to the Trust stating the name and address of such owner, the number of Equity Shares and other Equity Shares Beneficially Owned, a description of the manner in which such shares are held, and whether or not the Beneficial Owner of such shares is a "foreign person" as such term is used in Section 897(h) of the Code. Each such owner shall provide to the Trust such additional information as the Trust may request in order to determine the effect, if any, of such Beneficial Ownership on the Trust's status as a REIT or as a "domestically-controlled qualified investment entity" (as such term is defined in Section 897(h) of the Code) and to ensure compliance with the Aggregate Share Ownership Limit.

(b) each Person who is a Beneficial or Constructive Owner of Equity Shares and each Person (including the shareholder of record) who is holding Equity Shares for a Beneficial or Constructive Owner shall promptly provide to the Trust such information as the Trust may request, in good faith, in order to determine the Trust's status as a REIT or as a "domestically-controlled qualified investment entity" (as such term is defined in Section 897(h) of the Code) and to comply with requirements of any taxing authority or governmental authority or to determine such compliance.

Section 7.2.5 Remedies Not Limited. Subject to Section 5.1 of the Declaration of Trust, nothing contained in this Section 7.2 shall limit the authority of

the Board of Trustees to take such other action as it deems necessary or advisable to protect the Trust and the interests of its shareholders in preserving the Trust's status as a REIT.

Section 7.2.6 Ambiguity. In the case of an ambiguity in the application of any of the provisions of this Section 7.2, Section 7.3 or any definition contained in Section 7.1, the Board of Trustees shall have the power to determine the application of the provisions of this Section 7.2 or Section 7.3 with respect to any situation based on the facts known to it. In the event Section 7.2 or 7.3 requires an action by the Board of Trustees and the Declaration of Trust fails to provide specific guidance with respect to such action, the Board of Trustees shall have the power to determine the action to be taken so long as such action is not contrary to the provisions of Sections 7.1, 7.2 or 7.3.

Section 7.2.7 Exceptions.

(a) Subject to Section 7.2.1(a)(ii), the Board of Trustees, in its sole discretion, may exempt an Individual from the Aggregate Share Ownership Limit and may establish or increase an Excepted Holder Limit for such Individual if:

(i) the Board of Trustees obtains such representations and undertakings from such Individual as are reasonably necessary to ascertain that no Individual's Beneficial or Constructive Ownership of such Equity Shares will violate Section 7.2.1(a)(ii);

(ii) such Individual does not and represents that it will not own, actually or Constructively, an interest in a tenant of the Trust (or a tenant of any entity owned or controlled by the Trust) that would cause the Trust to own, actually or Constructively, more than a 9.8% interest (as set forth in Section 856(d)(2)(B) of the Code) in such tenant and the Board of Trustees obtains such representations and undertakings from such Individual as are reasonably necessary to ascertain this fact (for this purpose, a tenant from whom the Trust (or an entity owned or controlled by the Trust) derives (and is expected to continue to derive) a sufficiently small amount of revenue such that, in the opinion of the Board of Trustees, rent from such tenant would not adversely affect the Trust's ability to qualify as a REIT, shall not be treated as a tenant of the Trust); and

(iii) such Individual agrees that any violation or attempted violation of such representations or undertakings (or other action which is contrary to the restrictions contained in Sections 7.2.1 through 7.2.6) will result in such Equity Shares being automatically transferred to a Charitable Trust in accordance with Sections 7.2.1(b) and 7.3.

(b) Prior to granting any exception pursuant to Section 7.2.7(a), the Board of Trustees may require a ruling from the Internal Revenue Service, or an opinion of counsel, in either case in form and substance satisfactory to the Board of Trustees in its sole discretion, as it may deem necessary or advisable in order to determine or ensure the Trust's status as a

REIT. Notwithstanding the receipt of any ruling or opinion, the Board of Trustees may impose such conditions or restrictions as it deems appropriate in connection with granting such exception.

(c) Subject to Section 7.2.1(a)(ii), an underwriter which participates in a public offering or a private placement of Equity Shares (or securities convertible into or exchangeable for Equity Shares) may Beneficially Own or Constructively Own Equity Shares (or securities convertible into or exchangeable for Equity Shares) in excess of the Aggregate Share Ownership Limit, but only to the extent necessary to facilitate such public offering or private placement.

(d) The Board of Trustees may only reduce the Excepted Holder Limit for an Excepted Holder: (1) with the written consent of such Excepted Holder at any time, or (2) pursuant to the terms and conditions of the agreements and undertakings entered into with such Excepted Holder in connection with the establishment of the Excepted Holder Limit for that Excepted Holder. No Excepted Holder Limit shall be reduced to a percentage that is less than the Aggregate Share Ownership Limit.

Section 7.2.8 Changes in Aggregate Share Ownership Limit. Subject to Section 7.2.1(a)(ii), the Board of Trustees may from time to time establish or increase an Excepted Holder Limit for one or more Individuals (whereby such Individual will be an Excepted Holder) and decrease the Aggregate Share Ownership Limit for all other Individuals; provided,

however, that the decreased Aggregate Share Ownership Limit will not be effective for any Individual whose percentage ownership of Shares is in excess of such decreased Aggregate Share Ownership Limit until such time as such Individual's percentage of Shares equals or falls below the decreased Aggregate Share Ownership Limit, but any further acquisition of Shares in excess of such percentage ownership of Shares will be in violation of the Aggregate Share Ownership Limit and, provided further, that the new Excepted Holder Limit, Aggregate Share Ownership Limit would not allow five or fewer Individuals to Beneficially Own more than 49.9% in value of the outstanding Shares.

Section 7.2.9 Legend. Each certificate for Equity Shares (if such Equity Shares are certificated, which determination shall be at the sole discretion of the Board of Trustees) shall bear substantially the following legend and any other legend required by the Shareholders Agreement (to the extent such legend is still required):

> The shares represented by this certificate are subject to restrictions on Beneficial and Constructive Ownership and Transfer for the purpose of the Trust's maintenance of its status as a Real Estate Investment Trust (a "REIT") under the Internal Revenue Code of 1986, as amended (the "Code"). Subject to certain further restrictions and except as expressly provided in the Trust's Declaration of Trust, (i) no Individual may Beneficially Own Equity Shares of the Trust in excess of 7.8

percent of the value of the total outstanding Equity Shares of the Trust, unless such Individual Is an Excepted Holder (in which case the Excepted Holder Limit shall be applicable); (ii) no Person may Beneficially or Constructively Own Equity Shares that would result in the Trust being "closely held" under Section 856(h) of the Code or otherwise cause the Trust to fail to qualify as a REIT; and (iii) no Person may Transfer Equity Shares if such Transfer would result in Equity Shares of the Trust being owned by fewer than 100 Persons. Any Person who Beneficially or Constructively Owns or attempts to Beneficially or Constructively Own Equity Shares which cause or will cause a Person to Beneficially or Constructively Own Equity Shares in excess or in violation of the above limitations must immediately notify the Trust. If any of the restrictions on transfer or ownership are violated, the Equity Shares represented hereby will be automatically transferred to a Trustee of a Charitable Trust for the benefit of one or more Charitable Beneficiaries. In addition, upon the occurrence of certain events, attempted Transfers in violation of the restrictions described above may be void *ab initio*. All capitalized terms in this legend have the meanings defined in the Trust's Declaration of Trust, as the same may be amended from time to time, a copy of which, including the restrictions on transfer and ownership, will be furnished to each holder of Equity Shares of the Trust on request and without charge.

Instead of the foregoing legend, the certificate may state that the Trust will furnish a full statement about certain restrictions on transferability to a shareholder on request and without charge.

Section 7.3 Transfer of Equity Shares in Trust.

Section 7.3.1 Ownership in Trust. Upon any purported Transfer or other event described in Section 7.2.1(b) that would result in a transfer of Equity Shares to a Charitable Trust, such Equity Shares shall be deemed to have been transferred to the Trustee as trustee of a Charitable Trust for the exclusive benefit of one or more Charitable Beneficiaries. Such transfer to the Trustee shall be deemed to be effective as of the close of business on the Business Day prior to the purported Transfer or other event that results in the transfer to the Charitable Trust pursuant to Section 7.2.1(b). The Trustee shall be appointed by the Trust and shall be a Person unaffiliated with the Trust and any Prohibited Owner. Each Charitable Beneficiary shall be designated by the Trust as provided in Section 7.3.6.

Section 7.3.2 Status of Shares Held by the Trustee. Equity Shares held by the Trustee shall be issued and outstanding Equity Shares of the Trust. The Prohibited Owner shall have no rights in the shares held by the Trustee. The Prohibited Owner shall not benefit economically from ownership of any shares held in trust by the Trustee, shall have no rights to dividends or other distributions and shall not possess any rights

to vote or other rights attributable to the shares held in the Charitable Trust.

Section 7.3.3 Dividend and Voting Rights. The Trustee shall have all voting rights and rights to dividends or other distributions with respect to Equity Shares held in the Charitable Trust, which rights shall be exercised for the exclusive benefit of the Charitable Beneficiary. Any dividend or other distribution paid prior to the discovery by the Trust that Equity Shares have been transferred to the Trustee shall be paid with respect to such Equity Shares to the Trustee upon demand and any dividend or other distribution authorized but unpaid shall be paid when due to the Trustee. Any dividends or distributions so paid over to the Trustee shall be held in trust for the Charitable Beneficiary. The Prohibited Owner shall have no voting rights with respect to shares held in the Charitable Trust and, subject to Maryland law, effective as of the date that Equity Shares have been transferred to the Trustee, the Trustee shall have the authority (at the Trustee's sole discretion) (i) to rescind as void any vote cast by a Prohibited Owner prior to the discovery by the Trust that Equity Shares have been transferred to the Trustee and (ii) to recast such vote In accordance with the desires of the Trustee acting for the benefit of the Charitable Beneficiary; provided, however, that if the Trust has already taken irreversible trust action, then the Trustee shall not have the authority to rescind and recast such vote. Notwithstanding the provisions of this Article VII, until the Trust has

received notification that Equity Shares have been transferred into a Charitable Trust, the Trust shall be entitled to rely on its share transfer and other shareholder records for purposes of preparing lists of shareholders entitled to vote at meetings, determining the validity and authority of proxies and otherwise conducting votes of shareholders.

Section 7.3.4 Sale of Shares by Trustee. Within 20 days of receiving notice from the Trust that Equity Shares have been transferred to the Charitable Trust, the Trustee of the Charitable Trust shall sell the shares held in the Charitable Trust to a person, designated by the Trustee, whose ownership of the shares will not violate the ownership limitations set forth in Section 7.2.1(a). Upon such sale, the interest of the Charitable Beneficiary in the shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner and to the Charitable Beneficiary as provided in this Section 7.3.4. The Prohibited Owner shall receive the lesser of (1) the price paid by the Prohibited Owner for the shares or, if the Prohibited Owner did not give value for the shares in connection with the event causing the shares to be held in the Charitable Trust (e.g., in the case of a gift, devise or other such transaction), the Market Price of the shares on the day of the event causing the shares to be held in the Charitable Trust and (2) the price per share received by the Trustee from the sale or other disposition of the shares held in the Charitable Trust. Any net sales proceeds in excess of the amount payable to the Prohibited Owner shall

be immediately paid to the Charitable Beneficiary. If, prior to the discovery by the Trust that Equity Shares have been transferred to the Trustee, such shares are sold by a Prohibited Owner, then (i) such shares shall be deemed to have been sold on behalf of the Charitable Trust and (ii) to the extent that the Prohibited Owner received an amount for such shares that exceeds the amount that such Prohibited Owner was entitled to receive pursuant to this Section 7.3.4, such excess shall be paid to the Trustee upon demand.

Section 7.3.5 Purchase Right in Shares Transferred to the Trustee. Equity Shares transferred to the Trustee shall be deemed to have been offered for sale to the Trust, or its designee, at a price per share equal to the lesser of (i) the price per share in the transaction that resulted in such transfer to the Charitable Trust (or, in the case of a devise or gift, the Market Price at the time of such devise or gift) and (ii) the Market Price on the date the Trust, or its designee, accepts such offer. The Trust shall have the right to accept such offer until the Trustee has sold the shares held in the Charitable Trust pursuant to Section 7.3.4. Upon such a sale to the Trust, the interest of the Charitable Beneficiary in the shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner.

Section 7.3.6 Designation of Charitable Beneficiaries. By written notice to the Trustee, the Trust shall designate one or more nonprofit organizations to be the Charitable Beneficiary of the interest in the Charitable Trust such that (i) Equity Shares held in

the Charitable Trust would not violate the restrictions set forth in Section 7.2.1(a) in the hands of such Charitable Beneficiary and (ii) each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A), 2055 and 2522 of the Code.

Section 7.4 NYSE Transactions. Nothing in this Article VII shall preclude the settlement of any transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system. The fact that the settlement of any transaction occurs shall not negate the effect of any other provision of this Article VII and any transferee in such a transaction shall be subject to all of the provisions and limitations set forth in this Article VII.

Section 7.5 Enforcement. The Trust is authorized specifically to seek equitable relief, including injunctive relief, to enforce the provisions of this Article VII.

Section 7.6 Non-Waiver. No delay or failure on the part of the Trust or the Board of Trustees in exercising any right hereunder shall operate as a waiver of any right of the Trust or the Board of Trustees, as the case may be, except to the extent specifically waived in writing.

## ARTICLE VIII

## SHAREHOLDER AGREEMENT RESTRICTIONS ON TRANSFER AND OWNERSHIP OF SHARES

Section 8.1 Definitions. For the purposes of this Article VIII, the term "Transfer" shall have the meaning set forth in the Shareholders Agreement. Terms used but not defined in this Article VIII shall have the meanings assigned to them in the Shareholders Agreement.

Section 8.2 Restrictions. No Shareholder shall be entitled to Transfer any Shares at any time if such Transfer would (a) violate the Securities Act, or any state (or other jurisdiction) securities or "Blue Sky" laws applicable to the Company or the applicable Transfer of Shares; (b) cause the Company to become subject to the registration requirements of the U.S. Investment Company Act of 1940, as amended from time to time; (c) cause the Company to fail to be a "domestically-controlled qualified investment entity" within the meaning of Section 897(h) of the Code; or (d) otherwise violate the restrictions on Transfer contained in the Shareholders Agreement (to the extent any such restriction is still in effect).

Section 8.3 Transfers Void. Any Transfer in violation of Section 8.2 and the related provisions of the Shareholders Agreement (to the extent any such restriction is still in effect) shall be null and void *ab initio*.

Section 8.4 Compliance with Right of First Refusal and Tag Along Rights. To the extent applicable to a Shareholder pursuant to the Shareholders Agreement, no transfer of Shares shall occur without compliance with the rights of first refusal set forth in Section 3.2 of the Shareholders Agreement and compliance with the tag along rights in Section 3.3 of the Shareholders Agreement.

## ARTICLE IX

## SHAREHOLDERS

Section 9.1 Meetings. There shall be an annual meeting of the shareholders, to be held on proper notice at such time (after the delivery of the annual report) and convenient location as shall be determined by or in the manner prescribed in the Bylaws, for the election of the Trustees, if required, and for the transaction of any other business within the powers of the Trust. Except as otherwise provided in the Declaration of Trust, special meetings of shareholders may be called in the manner provided in the Bylaws. If there are no Trustees, the officers of the Trust shall promptly call a special meeting of the shareholders entitled to vote for the election of successor Trustees. Any meeting may be adjourned and reconvened as the Trustees determine or as provided in the Bylaws.

Section 9.2 Voting Rights. Subject to the provisions of any class or series of Shares then outstanding, the shareholders shall be entitled to vote only on

the following matters: (a) election of Trustees as provided in Section 5.2 and the removal of Trustees as provided in Section 5.3; (b) amendment of the Declaration of Trust as provided in Article XI; (c) termination of the Trust as provided in Section 14.2; (d) merger or consolidation of the Trust, or the sale or disposition of substantially all of the Trust Property, as provided in Article XII; and (e) such other matters with respect to which the Board of Trustees has adopted a resolution declaring that a proposed action is advisable and directing that the matter be submitted to the shareholders for approval or ratification. Except with respect to the foregoing matters, no action taken by the shareholders at any meeting shall in any way bind the Board of Trustees.

Section 9.3 Preemptive and Appraisal Rights. Except as may be provided by the Board of Trustees in setting the terms of classified or reclassified Shares pursuant to Section 6.4, or as may otherwise be provided by contract approved by the Board of Trustees, no holder of Shares shall, as such holder, have any preemptive right to purchase or subscribe for any additional Shares of the Trust or any other security of the Trust which it may issue or sell. Holders of Shares shall not be entitled to exercise any rights of an objecting shareholder provided for under Title 8 and Title 3, Subtitle 2 of the MGCL or any successor statute unless the Board of Trustees, upon the affirmative vote of a majority of the Board of Trustees, shall determine that such rights apply, with respect to all or any classes or series of Shares, to one

or more transactions occurring after the date of such determination in connection with which holders of such Shares would otherwise be entitled to exercise such rights.

Section 9.4 Extraordinary Actions. Except as specifically provided in Section 5.3 (relating to removal of Trustees), Section 12.3 with respect to Section 5.3 and Article X, and the Shareholders Agreement, notwithstanding any provision of law permitting or requiring any action to be taken or authorized by the affirmative vote of the holders of a greater number of votes, any such action shall be effective and valid if advised by the Board of Trustees and taken or approved by the affirmative vote of holders of Shares entitled to cast a majority of all the votes entitled to be cast on the matter.

Section 9.5 Board Approval. The submission of any action to the shareholders for their consideration shall first be approved by the Board of Trustees.

Section 9.6 Action By Shareholders without a Meeting. The Bylaws of the Trust may provide that any action required or permitted to be taken by the shareholders may be taken without a meeting by the written consent of the shareholders entitled to cast a sufficient number of votes to approve the matter as required by statute, the Declaration of Trust or the Bylaws of the Trust, as the case may be.

## ARTICLE X

## LIABILITY LIMITATION, INDEMNIFICATION AND TRANSACTIONS WITH THE TRUST

Section 10.1 Limitation of Shareholder Liability. No shareholder shall be liable for any debt, claim, demand, judgment or obligation of any kind of, against or with respect to the Trust by reason of his being a shareholder, nor shall any shareholder be subject to any personal liability whatsoever, in tort, contract or otherwise, to any person in connection with the property or the affairs of the Trust by reason of his being a shareholder.

Section 10.2 Limitation of Trustee and Officer Liability. To the maximum extent that Maryland law in effect from time to time permits limitation of the liability of trustees and officers of a real estate investment trust, no Trustee or officer of the Trust shall be liable to the Trust or to any shareholder for money damages. Neither the amendment nor repeal of this Section 10.2, nor the adoption or amendment of any other provision of the Declaration of Trust inconsistent with this Section 10.2, shall apply to or affect in any respect the applicability of the preceding sentence with respect to any act or failure to act which occurred prior to such amendment, repeal or adoption.

Section 10.3 Indemnification. The Trust shall have the power, to the maximum extent permitted by Maryland law in effect from time to time, to obligate itself to indemnify, and to pay or reimburse reasonable

expenses in advance of final disposition of a proceeding to, (a) any individual who is a present or former shareholder, Trustee or officer of the Trust or (b) any individual who, while a Trustee or officer of the Trust and at the request of the Trust, serves or has served as a director, officer, partner, trustee, member, manager, employee or agent of another real estate investment trust, corporation, limited liability company, partnership, joint venture, trust, employee benefit plan or any other enterprise from and against any claim or liability to which such person may become subject or which such person may incur by reason of his status as a present or former shareholder, Trustee or officer of the Trust. The Trust shall have the power, with the approval of its Board of Trustees, to provide such indemnification and advancement of expenses to a person who served a predecessor of the Trust in any of the capacities described in (a) or (b) above and to any employee or agent of the Trust or a predecessor of the Trust.

Section 10.4 Transactions Between the Trust and its Trustees, Officers, Employees and Agents. Subject to any express restrictions in the Declaration of Trust or the Shareholders Agreement or adopted by the Trustees in the Bylaws or by resolution, the Trust may enter into any contract or transaction of any kind with any person, including any Trustee, officer, employee or agent of the Trust or any person affiliated with a Trustee, officer, employee or agent of the Trust, whether or not any of them has a financial interest in such transaction.

## ARTICLE XI

## CORPORATE OPPORTUNITIES

Section 11.1 Applicability of Provisions. With respect to this Article XI: (a) until the IPO (as defined in the Shareholders Agreement) of the Trust, the provisions of Section 11.2 shall be effective, but Sections 11.3 through 11.8 shall not be effective; and (b) from and after the IPO, Sections 11.3 through 11.8 shall be effective, but Section 11.2 shall not be effective.

Section 11.2 Waiver of Corporate Opportunity (Pre-IPO). To the fullest extent permitted by applicable law and as contemplated by the Shareholders Agreement, the Trust, on behalf of itself and its subsidiaries, renounces any interest, duty or expectancy of the Trust and its subsidiaries in, or in being offered an opportunity to participate in, business opportunities that are from time to time presented to any Shareholder Party (as defined in the Shareholder Agreement) even if the opportunity is one that the Trust or its subsidiaries might reasonably be deemed to have pursued or had the ability or desire to pursue if granted the opportunity to do so and each Shareholder Party shall have no duty to communicate or offer such business opportunity to the Trust or any of its subsidiaries and, to the fullest extent permitted by applicable law, shall not be liable to the Trust or any of its subsidiaries for breach of any duty, as a Trustee of the Trust or otherwise, by reason of the fact that such Shareholder Party pursues or acquires such

business opportunity, directs such business opportunity to another Person or fails to present such business opportunity, or information regarding such business opportunity, to the Trust or its subsidiaries.

Section 11.3 Definitions (Post-IPO). For the purpose of this Article XI, the following terms shall have the following meanings:

Affiliate. The term "Affiliate" shall mean, with respect to any specified person or entity, any other person or entity who or which, directly or indirectly, controls, is controlled by, or is under common control with such person or entity, including, without limitation, any general partner, managing member or partner, officer, director or trustee of such person or entity or any private equity fund now or hereafter existing that is controlled by one or more general partners or managing members of, or shares the same management company with, such person or entity. For purposes of this definition, the terms "controlling," "controlled by," or "under common control with" shall mean the possession, directly or indirectly, of (i) the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract, or otherwise, or (ii) the power to elect or appoint at least 50% of the directors, managers, general partners, or persons exercising similar authority with respect to such person or entity.

Retained Opportunity. The term "Retained Opportunity" shall mean any corporate opportunity (a) which the Trust is financially able to undertake, (b) which the Trust is not prohibited by contract or applicable law from pursuing or undertaking, (c) which, from its nature, is in the line of the Trust's business, (d) which is of practical advantage to the Trust, and (e) in which the Trust has an interest or a reasonable expectancy.

GSCP Entity. The terms "GSCP Entities" and "GSCP Entity" shall mean the GSCP Funds, their respective Affiliates and any portfolio company in which any of the foregoing has any equity investment (other than the Trust and its subsidiaries).

GSCP Funds. The term "GSCP Funds" shall mean GS Capital Partners VI Fund, L.P., GS Capital Partners VI Parallel, L.P., GSCP VI Offshore IceCap Investment, L.P., GSCP VI GmbH IceCap Investment, L.P. and IceCap2 Holdings, L.P.

GSCP Nominee. The term "GSCP Nominee" shall mean any officer, trustee, director, partner, member, manager, employee, or other agent of a GSCP Entity.

Yucaipa Entity. The terms "Yucaipa Entities" and "Yucaipa Entity" shall mean the Yucaipa Funds, their respective Affiliates and any portfolio company in which any of the foregoing has any equity investment (other than the Trust and its subsidiaries).

Yucaipa Funds. The term "Yucaipa Funds" shall mean Yucaipa American Alliance Fund I, LP, Yucaipa

American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund II, L.P., Yucaipa American Alliance (Parallel) Fund II, L.P. and Yucaipa Corporate Initiatives Fund I, LP and any other entity managed, controlled or owned, directly or indirectly, by any such fund (or by any Affiliate of any such fund) that may acquire any direct or indirect interest in the Trust.

Yucaipa Nominee. The term "Yucaipa Nominee" shall mean any officer, trustee, director, partner, member, manager, employee, or other agent of a Yucaipa Entity.

Section 11.4 General (Post-IPO). In recognition that (i) the GSCP Funds and the Yucaipa Funds are and will be significant shareholders of the Trust; (ii) the GSCP Entities and the Yucaipa Entities have participated, directly or indirectly, and will continue to participate in investments in entities and enterprises some of which may engage in or relate to businesses that are the same as or similar to that of the Trust and/or its subsidiaries or that may compete with, or involve persons or entities that compete with, the Trust and/or its subsidiaries; (iii) owners, partners, directors and employees of the GSCP Entities or the Yucaipa Entities may be directors, managers, employees or advisors of entities (including, among others, the Trust and/or its subsidiaries) in which a GSCP Entity or a Yucaipa Entity, as applicable, has invested or may invest and, in such positions, may encounter business opportunities that the Trust or its subsidiaries or shareholders may desire to pursue;

and (iv) the Trust and its subsidiaries will derive benefits from the potential participation of GSP Nominees and Yucaipa Nominees in the Trust or its subsidiaries, whether as trustees, directors, employees or otherwise, and through their continued contractual, corporate and business relations with the GSCP Entities or the Yucaipa Entities, as applicable, the provisions of this Article XI are set forth to regulate, define and guide, to the fullest extent permitted by applicable law, the conduct of certain affairs of the Trust and its subsidiaries as they may involve GSCP Entities, GSCP Nominees, Yucaipa Entitles and Yucaipa Nominees and the powers, rights, duties and liabilities of the Trust, the GSCP Funds and the Yucaipa Funds and their respective officers, directors, trustees, employees, members, managers, shareholders, partners and agents in connection therewith.

Section 11.5 Provisions Related Business Activities (Post-IPO). The GSCP Entities and the Yucaipa Entities shall have the right to (and none of the GSCP Entities, the Yucaipa Entities nor any GSCP Nominee or Yucaipa Nominee shall have any obligation or duty to abstain or cause any GSCP Entity or Yucaipa Entity, as applicable, to abstain from exercising such right to): (i) engage or invest, directly or indirectly, in the same, similar or related business activities or lines of business as the Trust and/or its subsidiaries, (ii) do business with any customer, supplier or lessor of the Trust or its subsidiaries and (iii) employ or otherwise engage any officer, trustee or employee of the Trust or its subsidiaries.

Section 11.6 Corporate Opportunities (Post-IPO). if (i) any GSCP Entity or any GSCP Nominee acquires knowledge of a potential transaction or matter that may be a corporate opportunity for any GSCP Entity, or (ii) any Yucaipa Entity or any Yucaipa Nominee acquires knowledge of a potential transaction or matter that may be a corporate opportunity for any Yucaipa Entity, none of the Trust or its subsidiaries or shareholders shall have any interest in such corporate opportunity or any expectation that such corporate opportunity be offered to it or that it be offered an opportunity to participate therein, and any such interest, expectation, offer or opportunity to participate, and any other interest or expectation otherwise due to the Trust or its subsidiaries or shareholders with respect to such corporate opportunity, is hereby renounced by the Trust on its behalf and on behalf of its subsidiaries and its shareholders. Accordingly, (i) no GSCP Entity or GSCP Nominee, Yucaipa Entity or Yucaipa Nominee, will be under any obligation or duty to present, communicate or offer any such corporate opportunity to the Trust or any of its subsidiaries and (ii) the GSCP Entities and the Yucaipa Entities shall have the right to hold and exploit any such corporate opportunity for their own account, or to direct, recommend, sell, assign or otherwise transfer such corporate opportunity to any person or entity other than the Trust and its subsidiaries and shall be under no obligation or duty to act otherwise.

Section 11.7 Trustees, Officers and Employees (Post-IPO). Notwithstanding the provisions of Section 11.6 above, the Trust does not renounce any interest or expectancy it may have under applicable law in any Retained Opportunity that is expressly offered to a GSCP Nominee or a Yucaipa Nominee solely in, and as a direct result of, his or her capacity as a trustee, officer or employee of the Trust. If the Chief Executive Officer, the Chief Operating Officer or the Chief Financial Officer of the Trust (or, during the vacancy of any of those titles, the executive officer performing the functions of such vacant role) shall be a (i) GSCP Nominee by virtue of his or her respective relationship with a GSCP Entity, or (ii) Yucaipa Nominee by virtue of his or her respective relationship with a Yucaipa Entity, then any corporate opportunity offered to such officer shall be deemed to have been offered solely in, and as a direct result of, such officer's rapacity as an officer of the Trust unless such offer clearly and expressly is presented to such officer solely in, and as a direct result of, his or her capacity as an officer, trustee, director, partner, member, manager, employee or other agent of a GSCP Entity or a Yucaipa Entity, as applicable.

Section 11.8 Application of Provision (Post-IPO). This Article XI shall apply as set forth above except to the extent otherwise prohibited by applicable law. No alteration, amendment, termination, expiration or repeal of this Article XI, nor the adoption of any provision of the Declaration of Trust inconsistent with this Article XI shall eliminate, reduce, apply to, or

have any effect on (i) the protections afforded hereby to any GSCP Entity, GSCP Nominee, Yucaipa Entity or Yucaipa Nominee for or with respect to any investments, activities or opportunities of which such GSCP Entity, GSCP Nominee, Yucaipa Entity or Yucaipa Nominee, as applicable, becomes aware prior to such alteration, amendment, termination, expiration, repeal or adoption or (ii) any matter occurring, or any cause of action, suit or claim that, but for this Article XI, would accrue or arise, prior to such alteration, amendment, repeal or adoption.

## ARTICLE XII

## AMENDMENTS

Section 12.1 General. The Trust reserves the right from time to time to make any amendment to the Declaration of Trust, now or hereafter authorized by law, including any amendment altering the terms or contract rights, as expressly set forth in the Declaration of Trust, of any Shares. All rights and powers conferred by the Declaration of Trust on shareholders, Trustees and officers are granted subject to this reservation. An amendment to the Declaration of Trust (a) shall be signed and acknowledged by at least a majority of the Trustees, or an officer duly authorized by at least a majority of the Trustees, (b) shall be filed for record as provided in Section 15.5 and (c) shall become effective as of the later of the time the SDAT accepts the amendment for record or the time established in the amendment, not to exceed

30 days after the amendment is accepted for record. All references to the Declaration of Trust shall include all amendments and supplements thereto. For the avoidance of doubt, this Article XII shall be subject to the terms and conditions of the Shareholders Agreement.

Section 12.2 By Trustees. The Trustees may amend the Declaration of Trust from time to time, in the manner provided by Title 8, without any action by the shareholders, (i) to qualify as a real estate investment trust under the Code or under Title 8, (ii) in any respect in which the charter of a corporation may be amended in accordance with Section 2-605 of the MGCL and (iii) as otherwise provided in the Declaration of Trust.

Section 12.3 By Shareholders. Except as otherwise provided in the Declaration of Trust, any amendment to the Declaration of Trust shall be valid only if approved by the affirmative vote of a majority of all the votes entitled to be cast on the matter. Any amendment to Section 5.3, Article X or to this sentence of the Declaration of Trust shall be valid only if approved by the affirmative vote of two-thirds of all the votes entitled to be cast on the matter.

## ARTICLE XIII

## MERGER, CONSOLIDATION OR SALE OF TRUST PROPERTY

Subject to the provisions of any class or series of Shares at the time outstanding, the Trust may (a) merge the Trust into another entity, (b) consolidate the Trust with one or more other entities into a new entity or (c) sell, lease, exchange or otherwise transfer all or substantially all of the Trust Property. Any such action must be approved by the Board of Trustees and, after notice to all shareholders entitled to vote on the matter, by the affirmative vote of a majority of all the votes entitled to be cast on the matter. For the avoidance of doubt, this Article XIII shall be subject to the terms and conditions of the Shareholders Agreement.

## ARTICLE XIV

## DURATION AND TERMINATION OF TRUST

Section 14.1 Duration. The Trust shall continue perpetually unless terminated pursuant to Section 14.2 or pursuant to any applicable provision of Title 8.

Section 14.2 Termination.

(a) Subject to the provisions of any class or series of Shares at the time outstanding, after approval by a majority of the entire Board of Trustees, the Trust may be terminated at any meeting of shareholders, by the affirmative vote of a majority of

all the votes entitled to be cast on the matter. Upon the termination of the Trust:

(i) The Trust shall carry on no business except for the purpose of winding up its affairs.

(ii) The Trustees shall proceed to wind up the affairs of the Trust and all of the powers of the Trustees under the Declaration of Trust shall continue, including the powers to fulfill or discharge the Trust's contracts, collect its assets, sell, convey, assign, exchange, transfer or otherwise dispose of all or any part of the remaining property of the Trust to one or more persons at public or private sale for consideration which may consist in whole or in part of cash, securities or other property of any kind, discharge or pay its liabilities and do all other acts appropriate to liquidate its business. The Trustees may appoint any officer of the Trust or any other person to supervise the winding up of the affairs of the Trust and delegate to such officer or such person any or all powers of the Trustees in this regard.

(iii) After paying or adequately providing for the payment of all liabilities, and upon receipt of such releases, indemnities and agreements as they deem necessary for their protection, the Trust may distribute the remaining property of the Trust among the shareholders so that after payment in full or the setting apart for payment of such preferential amounts, if any, to which the holders of any Shares at the time outstanding shall be entitled, the remaining property of the Trust shall, subject to any participating

or similar rights of Shares at the time outstanding, be distributed ratably among the holders of Common Shares at the time outstanding.

(b) After termination of the Trust, the liquidation of its business and the distribution to the shareholders as herein provided, a majority of the Trustees shall execute and file with the Trust's records a document certifying that the Trust has been duly terminated, and the Trustees shall be discharged from all liabilities and duties hereunder, and the rights and interests of all shareholders shall cease.

## ARTICLE XV

## MISCELLANEOUS

Section 15.1 Governing Law. The Declaration of Trust is executed and delivered in the State of Maryland with reference to the laws thereof, and the rights of all parties and the validity, construction and effect of every provision hereof shall be subject to and construed according to the laws of the State of Maryland without regard to conflicts of laws provisions thereof.

Section 15.2 Reliance by Third Parties. Any certificate shall be final and conclusive as to any person dealing with the Trust if executed by the Secretary or an Assistant Secretary of the Trust or a Trustee, and if certifying to: (a) the number or identity of Trustees, officers of the Trust or shareholders; (b) the due authorization of the execution of any

document; (c) the action or vote taken, and the existence of a quorum, at a meeting of the Board of Trustees or shareholders; (d) a copy of the Declaration of Trust or of the Bylaws as a true and complete copy as then in force; (e) an amendment to the Declaration of Trust; (f) the termination of the Trust; or (g) the existence of any fact relating to the affairs of the Trust. No purchaser, lender, transfer agent or other person shall be bound to make any inquiry concerning the validity of any transaction purporting to be made by the Trust on its behalf or by any officer, employee or agent of the Trust.

Section 15.3 Severability.

(a) The provisions of the Declaration of Trust are severable, and if the Board of Trustees shall determine, with the advice of counsel, that any one or more of such provisions (the "Conflicting Provisions") are in conflict with the Code, Title 8 or other applicable federal or state laws, the Conflicting Provisions, to the extent of the conflict, shall be deemed never to have constituted a part of the Declaration of Trust, even without any amendment of the Declaration of Trust pursuant to Article XI and without affecting or impairing any of the remaining provisions of the Declaration of Trust or rendering invalid or improper any action taken or omitted prior to such determination. No Trustee shall be liable for making or failing to make such a determination. In the event of any such determination by the Board of Trustees, the Board shall amend the Declaration of Trust in the manner provided in Section 12.2.

(b) If any provision of the Declaration of Trust shall be held invalid or unenforceable in any jurisdiction, such holding shall apply only to the extent of any such invalidity or unenforceability and shall not in any manner affect, impair or render invalid or unenforceable such provision in any other jurisdiction or any other provision of the Declaration of Trust in any jurisdiction.

Section 15.4 Construction. In the Declaration of Trust, unless the context otherwise requires, words used in the singular or in the plural include both the plural and singular and words denoting any gender include all genders. The title and headings of different parts are inserted for convenience and shall not affect the meaning, construction or effect of the Declaration of Trust. In defining or interpreting the powers and duties of the Trust and its Trustees and officers, reference may be made by the Trustees or officers, to the extent appropriate and not inconsistent with the Code or Title 8, to Titles 1 through 3 of the Corporations and Associations Article of the Annotated Code of Maryland.

Section 15.5 Recordation. The Declaration of Trust and any amendment or supplement hereto shall be filed for record with the SDAT and may also be filed or recorded in such other places as the Trustees deem appropriate, but failure to file for record the Declaration of Trust or any amendment or supplement hereto in any office other than in the State of Maryland shall not affect or impair the validity or effectiveness of the Declaration of Trust or any

amendment or supplement hereto. A restated Declaration of Trust shall, upon filing, be conclusive evidence of all amendments and supplements contained therein and may thereafter be referred to in lieu of the original Declaration of Trust and the various amendments and supplements thereto.

FOURTH: The total number of shares of beneficial interest which the Trust is authorized to issue has not changed by these Articles of Amendment and Restatement.

The undersigned acknowledges these Articles of Amendment and Restatement to be the trust act of the Trust and as to all matters or facts required to be verified under oath, the undersigned acknowledges that to the best of his knowledge, information and belief, these matters and facts are true in all material respects and that this statement is made under the penalties for perjury.

*[Signature page follows.]*

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**CUST ID:0002518541**
**WORK ORDER:0003735121**
**DATE:12-14-2010 11:47 AM**
**AMT. PAID:$1,027.00**

IN WITNESS WHEREOF, the Trust has caused these Articles of Amendment and Restatement to be signed in its name and on its behalf by its Executive Vice President and Chief Financial Officer and attested to by its Secretary on this 13th day of December, 2010.

| ATTEST: | AMERICOLD REALTY TRUST |
|---|---|
| /s/ Michael J. Delaney | /s/ R Hutchison (SEAL) |
| Michael J. Delaney, Secretary | Ronald B. Hutchison, Executive Vice President and Chief Financial Officer |